

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2034

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2034

GEORGE KAPLAN,
Petitioner-Appellant,

-against-

ROY BOMBARD, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

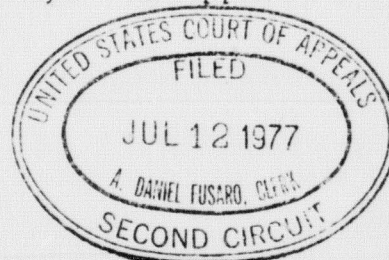
APPENDIX

ROBERT MORGENTHAU
District Attorney,
New York County
155 Leonard St.
New York, N.Y. 10013

Attorney for Appellee

KUNSTLER & HYMAN
370 Lexington Ave.
New York, N.Y. 10017

Attorneys for Appellant



PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	<u>Page</u>
District Court Opinion.....	1-16*
Petition for Habeas Corpus.....	17-29
Respondent's Answer to Habeas Corpus.....	28-29
Motion of Kassner & Detsky for Discovery.....	30-53
Motion of Kassner & Detsky for Dismissal and Severance.....	54-61
Colloquy December 12, 1973.....	62-70
Relevant Testimony of C. Hatton.....	71-90
Relevant Testimony of D. Morton.....	91-94
Relevant Testimony of H. Kassner.....	95-113
Relevant Testimony of H. Levin.....	113-128
Relevant Testimony of M. Hodas.....	129-192
New Trial Motion.....	193-204
Relevant Testimony of J. Bayarsky.....	205-230
Colloquy on Sentence.....	231-241
Summation - Defense	242-245

* All references to Appendix numbers are at the bottom of the page.

Rec'd 1/7/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
GEORGE KAPLAN,

Plaintiff,

:
: 76 Civ. 2435 (GLG)

-against-

: O P I N I O N

ROY BOMBARD, Superintendent Green-
haven Correctional Facility,

Defendant.
-----X

A P P E A R A N C E S :

KUNSTLER & HYMAN, ESQS.
Attorneys for Plaintiff
370 Lexington Avenue
New York, N.Y. 10017

By: Steven J. Hyman, Esq.
Of Counsel

Attorney General for the State
of New York
Attorney for Defendant
Two World Trade Center
New York, N.Y. 10047

G O E T T E L , D. J.

Petitioner, George Kaplan, has sought a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. He is presently incarcerated at the Greenhaven Correctional Facility, Stormville, New York, having been convicted of two counts of arson in the second degree and two counts of criminal mischief. Petitioner alleges that he has exhausted his state remedies, as required by 28 U.S.C. §2254. Respondent does not challenge this contention.

Kaplan was charged, along with Jerry Gomberg and Martin Hodas, with setting fire to two "massage parlors" competing with the "Geisha House" in Times Square, allegedly owned by them. They were charged with having three of their employees set two fires after warnings to their competitors to raise their prices had been ineffective.

In support of his petition, Kaplan alleges that he had been deprived of his constitutional rights to the effective assistance of counsel and was thus denied due process of law as guaranteed by Amendments Fifth, Sixth and Fourteenth.

At trial, Kaplan's attorneys, Kassner and Detsky, also represented the two co-defendants in the case.* It is alleged that "a conflict of interest arose of such magnitude as to prejudice petitioner and deny him a fair and effective defense." It is contended that petitioner did not knowingly and intelligently waive his rights to effective assistance of counsel since he was not properly advised by his attorneys that the theories of defense for himself and defendant Hodas (who was acquitted) were in substantial conflict. Finally, it is claimed that the trial court failed to make a proper inquiry into defendant's waiver and neglected to advise petitioner sufficiently of the possible nature of the conflict and the disability which it might place upon petitioner's counsel to effectively defend him.

* Detsky took charge of the pre-trial proceedings. Kassner tried the case. Detsky had represented two of the employee accomplices and only dropped them when ordered by the court since they had made statements incriminating their principal clients. (They testified for the prosecution at trial.) Kassner argued one of the appeals for Gomberg and while he was not so bold as to assert his own conduct as grounds for reversal, did contend that if Kaplan's arguments concerning a conflict prevailed it would require reversing the conviction of his client. To round out this performance, Kassner also appeared as a witness at trial for defendants.

In the unanimous decision of the New York State Court of Appeals, People v. Gomberg, 38 N.Y. 2d 307 (1975), it was held that the trialcourt had properly inquired of the appellants and their attorney whether joint representation would result in a conflict of interest. Such inquiry was deemed sufficient to protect Kaplan's right to effective assistance of counsel since all of the defendants were made aware of the possible conflict and elected to continue to retain attorneys Kassner and Detsky throughout the proceeding.

Before commencing the trial, Justice Denzer, who presided, asked the three defendants if they were dissatisfied with counsel or whether they believed that joint representation at trial would result in a conflict of interest. Hodas expressed a desire to continue with the present counsel. Kaplan didn't respond and Gomberg indicated that he did not understand the court's question. The court thereafter more fully explained the problem for the benefit of Gomberg and his two co-defendants:

I just want to make certain that in your mind there is no reason that one attorney should [sic] represent all three

Order
of
Governing
Body

of you; that the attorney won't be put in a position of having to take a course of action which is favorable to one, but not to another. I just want to make sure you don't feel that way. Apparently you don't if you retained the same attorney; do you understand? (R.20a-21a.)

Gomberg then indicated that he understood the situation and responded that it might be "better for us to get another lawyer." (R.21a). When Justice Denzer inquired whether there was any conflict between Gomberg and the other defendants, Gomberg replied, "I think maybe another lawyer would be helpful to us. * * * * I would like to talk it over with another lawyer." (R.21a). [During this exchange Kaplan remained silent.]

Afterwards, Justice Denzer pursued the conflicts issue by asking Detsky if anyone had ever indicated that there might be a conflict and suggested other counsel. Detsky answered:

Four or five days ago, I suggested to Mr. Hodas that there might be a conflict and either another or the other two should get themselves another lawyer. Mr. Hodas, Mr. Kaplan and Mr. Gomberg said they had

confidence in our firm to handle it. But I do want this Court to understand that it was discussed in our office and I felt one of the three should get another counselor.

The Court: The way the situation stands is that you advised them of this and they told you they didn't want to hire other counsel?

Mr. Detsky: That's correct. (R.23a).

The Court then terminated the inquiry and directed that trial commence but indicated that if, at any point in the trial, any defendant believed a conflict existed, he could have other counsel. Although the Court's inquiry was not directed at petitioner Kaplan per se, he was present during the extended discussion of the conflict issue and remained silent throughout. At no time during the proceeding did he object to the joint representation or indicate that a conflict might arise as a result of retaining Kassner and Detsky as defense counsel. [Furthermore, as Detsky indicated, he had consented to the joint representation at a meeting held prior to the trial.]

Detsky spoke of him & his agreed

As the New York Court of Appeals noted in its decision

6

on the appeal, the resolution of this issue brings into conflict two constitutional protections: the right to the effective assistance of counsel and the right to select counsel of one's choice.

The Supreme Court held in Johnson v. Zerbst, 304 U.S. 458 (1937) and Schneckloth v. Bustamonte, 412 U.S. 218 (1974), that any waiver of a fundamental constitutional right must be a knowing and intelligent one. In Schneckloth, the Court noted that the Johnson decision "established an appropriately heavy burden on the Government before waiver could be found -- 'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 236-37.

However, it is equally well-established that a defendant may waive his Sixth Amendment rights to effective assistance of counsel and to confrontation of witnesses just as he may knowingly and intelligently waive any constitutional right. See United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); Faretta v. California, 422 U.S. 806 (1975); Glasser v. United States, 315 U.S. 60, 70-71 (1942); Johnson v. Zerbst, supra, at 464-65; United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

7

In United States v. Mari, 526 F.2d 117 (2d Cir.

1975) the Second Circuit noted that the DeBerry case, supra:

....requires that the trial judge conduct a careful inquiry, including a personal interrogation of the defendants, to satisfy himself that no conflict exists and that the parties had no valid objection to joint representation. 526 F.2d at 119.

In United States v. Carrigan, Slip. op. Nos. 226-27

543 F.2d 1053 (2d Cir. 1976)
(2d Cir.) Docket Nos. 74-2056-57, Nov. 3, 1976), Judge Mulligan recapitulated the current state of the law in the Second Circuit:

When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him ... quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views. Slip. op. at 392 (Emphasis added).

In this case, the trial court attempted to make a reasonable inquiry into possible conflict. The court explained to the defendants what was meant by a conflict of interest.

~~conflict of interest~~
~~conflict of interest~~
8.

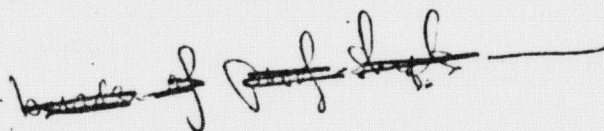
The court also questioned defense counsel and learned that the possibility of conflict had been discussed with the respective defendants and the suggestion was made that defendants might want to retain separate and different counsel. In United States v. Armone, 363 F.2d 385 (2d Cir. 1966), at 406, the Second Circuit held that the trial judge's inquiry directed to counsel as to possible conflict of interest was sufficient to protect the rights of the defendant. The court held moreover that nothing in Glasser v. United States, supra, requires the court to take further steps after receiving assurances from counsel that defendants have acquiesced in the retention of that attorney as defense counsel, after the defendants have been sufficiently informed of the potentiality of the conflict. Undoubtedly the procedures would have been enhanced by an allocation of Kaplan. United States v. Marl, supra. However, the court was faced with other difficulties. Defense counsel was seeking an adjournment of a month (although the case had been marked ready by both sides a couple of months earlier), which the prosecution was strenuously resisting. If his position was sought, Kaplan could have aided this strategy by replying, like Gomberg, that he wished to consult with another attorney about the possibility of obtaining new counsel.

~~added counsel -~~
9.

Nevertheless, the essential elements of a knowing and intelligent waiver of the effective assistance of counsel are present. Kaplan had been alerted by both the trial judge and his counsel as to the possibility of a conflict of interest arising from the joint representation of all defendants by the same counsel. Kaplan heard his counsel represent to the trial court that discussions had taken place and that Kaplan had consented to the continued representation. Finally, the trial court gave petitioner the opportunity to dispense with then present counsel and to retain different counsel either for representation or consultation, at any time during the course of the trial, if petitioner believed that any conflict or prejudice arose as a result of the joint representation.

~~11/18/80~~ { As the opinion of New York's Court of Appeals notes, the defendants were intelligent and perceptive businessmen. They did not complain at the time. Had they been compelled to take separate counsel and been convicted they would, quite likely, have asserted that their constitutional right to counsel of their choice had been violated. They cannot have things both ways.

The deficiencies, if any, in the pre-trial inquiry are immaterial unless it can be shown that the joint representation resulted in actual prejudice to the petitioner. The Second Circuit has considered a number of cases where the issue of denial of effective assistance of counsel was raised. It has generally been held that a defendant, to establish a Sixth Amendment claim, must demonstrate "some specific instance of prejudice, some real conflict of interest, resulting from the joint representation." United States v. Carrigan, *supra*; United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975); United States v. Vowteras, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); United States v. Wisniewski, 478 F.2d 274, 281 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970). "The mere representation of two or more defendants by a single attorney does not give rise to a constitutional deprivation of counsel." United States v. Carrigan, *supra*. The Carrigan panel adopted the First Circuit holding in United States v. Foster, 469 F.2d 1 (1st Cir. 1972), that the burden of proof shifts to the government when the trial court has failed to make a satisfactory inquiry on the question of prejudice.



Language in United States v. Morgan, 396 F.2d 110, 114 (2d Cir. 1968), concerns the problem of whether defendants with the same counsel should take the stand:

..... This kind of decision, difficult enough where two defendants at the same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel. The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable.

Here, only defendant Hodas took the stand. He testified that he was only a landlord collecting rent from the true owners of the Geisha House massage parlor, Kaplan and Gornberg, and, consequently, would have no reason or motive to drive competing massage parlors out of business. Petitioner's involvement in the massage parlor business was not put in issue but it is argued that this created a "negative fall out."

In the Carrigan case, the testimony of the defendant who took the stand directly conflicted with a statement his co-defendant had made to the F.B.I. thereby placing the co-defendant's credibility in issue. Since the co-defendant did not testify, this prejudice was permitted to stand unchecked. The Carrigan court held that these circumstances brought the case within the ambit of United States v. Morgan, supra, as prejudice sufficient to warrant a reversal of the co-defendant's conviction. In United States v. DeBerry, supra, the prejudice was even more clear-cut since the defendant who took the stand incriminated the non-testifying co-defendant with his testimony.

In the case at bar, as the State rightly contends, petitioner cannot merely point to a difference in his and Hodas' posture at trial and establish that there must have been a conflict of interest. See United States v. Lovano, supra; United cert. denied, 396 U.S. 825 (1969); States v. Sheiner, 410 F.2d 337 (2d Cir. 1969),/ United States v. Armone, 363 F.2d 385 (2d Cir.), cert. denied, 385 U.S. 957 (1966). Kaplan's defense did not run afoul of Hodas' defense because it was not a theory of the Hodas' defense to shift the blame for the arsons to Kaplan. There was merely an attempt made to

exculpate Hodas' without incriminating either of the other two co-defendants.

During a post-conviction hearing, Justice Denzer found that there was no conflict of interest among the defenses presented at trial for the three co-defendants. In fact, he found that there was a "community of interest" among the defendants in that the evidence was consistent "in indicating the equal responsibility of all three men." He stated further that:

The testimony throughout referred to Hodas, Kaplan and Gomberg - to Marty, George and Jerry.

When one made an incriminating statement or threat, or gave a direction indicating culpability, the others were almost invariably present and lent their assent.

When an act was described that was indicative of responsibility for the fires, it was linked jointly to all three; not isolated upon one defendant or another. There is no question of that.

The defendants' interests were identical insofar as their attack upon the People's evidence was concerned, namely to discredit the character and motives and veracity of the prosecution witnesses; in short, to discredit their testimony.

No defendant could rest comfortably, with any part of the People's case; for each it was imperative to show that it was unworthy of belief. (R.1676-77).

It was in the interest of all three defendants that the primary defense of discrediting the prosecution's witnesses was attempted because of this "community of interest" described by Justice Denzer. If the jury believed that Hodas' had taken no part in ordering and arranging the arsons this would undermine the prosecution's cases against all three defendants in its entirety since it was crucial to the consistency of state's evidence that all the events be linked to all the defendants.

Generally, a defendant's claim that he was denied effective assistance of counsel will not be entertained simply because his trial resulted in a guilty verdict and he was represented by the same attorney which a co-defendant also retained. As the Second Circuit in United States v. Wisniewski, supra, noted:

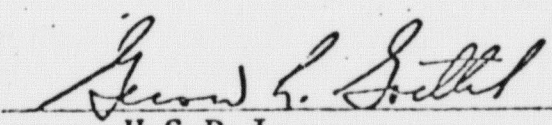
When a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest. * * * However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion
478 F.2d at 284.

Hodas had never been convicted of a crime in the past while both Kaplan and the third defendant, Gomberg, who also did not testify, had criminal records. Therefore, the testimony of Kaplan and Gomberg was subject to impeachment. The decision to call Hodas as a witness and not either of the other defendants appears to be a sound trial strategy since it avoided exposing defendants to impeachment by prior conviction as well as the risk of contradictory testimony. And, as noted earlier, Hodas' testimony worked to exculpate all defendants.

Petitioner's counsel put forth other ways in which the joint representation may have affected the trial strategies employed. They are not convincing. While the firm of Kassner and Detsky did not demonstrate a high degree of concern for the ethics of the profession, petitioner made a knowledgeable decision to be represented by them despite this. Moreover, the position of the defendants was so intertwined that (except possibly for Hodas, who was acquitted nevertheless) conflict and prejudice could hardly result. The petition must be denied.

SO ORDERED:

Dated: New York, N.Y.,
January 3, 1977.


U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE KAPLAN,

Petitioner,

-against-

ROY BOMBARD, SUPERINTENDENT,
GREENHAVEN CORRECTIONAL FACILITY,

Respondent.

NOTICE OF PETITION FOR
WRIT OF HABEAS CORPUS

76 Civ. 2435 (GLG)

S I R S :

PLEASE TAKE NOTICE, that the petitioner, by his attorneys, Kunstler & Hyman, upon the annexed verified petition for writ of habeas corpus, will move this Court before the Honorable Gerard L. Goettel, United States District Court Judge, at the United States District Court for the Southern District of New York, Foley Square, New York, N.Y., on the day of July, 1976, at 10:00 a.m. in the forenoon or as soon thereafter as counsel can. be heard for an order and judgment granting the petition for writ of habeas corpus pursuant to Title 28 U.S.C. §2254, and for such other and further relief as this Court may deem just in the premises.

Dated: New York, N.Y.
June 17, 1976

KUNSTLER & HYMAN
Attorneys for Petitioner

By _____
Steven J. Hyman, Partner
370 Lexington Avenue
New York, N.Y. 10017

TO:
ATTORNEY GENERAL OF THE
STATE OF NEW YORK
2 World Trade Center
New York, N.Y. 10047

MR. ROY BOMBARD, Superintendent,
Greenhaven Correctional Facility
c/o Department of Correctional Services
314 West 40th Street
New York, N.Y. 10018

Geo. Kaplan

FILE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE KAPLAN,

Petitioner,

-against-

ROY BOMBARD, SUPERINTENDENT, GREENHAVEN
CORRECTIONAL FACILITY,

Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS

76 Civ 2435

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK :

The petition of GEORGE KAPLAN, by his attorneys,
Kunstler & Hyman, respectfully shows that:

1. Petitioner is a citizen of the United States of America and of the State of New York.
2. Petitioner is at present detained and imprisoned at the Greenhaven Correctional Facility at Stormville, N.Y., by the respondent, ROY BOMBARD, Superintendent, by virtue of a verdict of guilty and a judgment and sentence pronounced by the Supreme Court of the State of New York, County of New York on April 19, 1974, within the district for which this Court sits. A single indictment, No. 3553/73, charged petitioner with two counts of arson in the second degree and two counts of criminal mischief. Petitioner was convicted of two counts of arson in the second degree and sentenced to an indeterminate term of imprisonment with a maximum of seven years.

3. Petitioner has exhausted his state remedies as required by 28 U.S.C. §2254, in that:

(a) The Appellate Division of the Supreme Court, First Department, on appeal by petitioner from the conviction, failed to treat petitioner's constitutional claims and affirmed petitioner's conviction without rendering an opinion on December 3, 1974.

(b) The Court of Appeals of the State of New York granted leave to appeal and on December 29, 1975, that court rendered an opinion reported at 38 N.Y. 2d 307, annexed hereto as Exhibit A, denying petitioner's constitutional claims and affirming petitioner's conviction.

(c) Thereafter an application for a stay of judgment was made to the Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States. That application was denied. No petition for certiorari was made by the petitioner.

4. No previous application for a writ of habeas corpus has been made in this or any other court.

5. Petitioner is in prison pursuant to a conviction obtained in violation of his fundamental constitutional rights in that at the trial of his case he was denied due process of law and otherwise deprived of the effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution.

6. Petitioner was deprived of due process of law and the effective assistance of counsel because trial counsel jointly represented petitioner and the two co-defendants and as a result, a conflict of interest arose of such magnitude as to prejudice petitioner and deny him a fair and effective defense.

7. Petitioner did not knowingly and intentionally waive any of his fundamental rights to the effective assistance of counsel. Petitioner did not know and was never advised that:

(a) the defense of a co-defendant would be in conflict with and different from petitioner's defense;

(b) that his attorney's loyalty would be divided and, in fact, would be primarily devoted to the defense of another defendant and decisions as to the defense and trial strategy would be made contrary to petitioner's best interests;

(c) that under the circumstances he was being represented by an attorney who could not act in an independent and effective manner on behalf of petitioner.

8. That prior to trial petitioner's counsel was in fact aware of the conflict yet failed and neglected to make such facts known to petitioner and otherwise failed to advise him of the dangers of continued joint representation and alternatives available to him.

9. That the trial court failed and neglected to make proper inquiry of petitioner and his attorney notwithstanding the fact that the court had notice of the existence of the conflict prior to the start of the trial. As a result, the trial court acted to petitioner's detriment and prejudice in that:

(a) it wrongfully presumed petitioner to have waived his fundamental rights to independent and effective counsel when, in fact, petitioner had made no such waiver;

(b) it wrongfully relied upon the representation made by petitioner's lawyer when such representations were equivocal and contradictory and where, under the unique circumstances presented, direct questioning of petitioner was required in order to determine the true facts necessary to permit the case to proceed;

(c) it wrongfully failed to take action appropriate under the circumstances to preserve petitioner's rights to the effective assistance of counsel or, in the alternative, to obtain from petitioner a knowing and intelligent waiver of such rights.

10. Annexed hereto and made a part hereof as Exhibit B to the petition is the Appendix filed in the New York State Court of Appeals in the case of People v. George Kaplan. All references set forth below will be to the said Appendix or to the actual trial transcript, where applicable.

11. That petitioner is 46 years of age; has a 6th grade education and has primarily earned his living, since early youth, as a professional boxer and then a bouncer in a variety of night clubs, cafes and the like.

12. That petitioner is in no way a "perceptive" or "intelligent businessman", lacking the education and business expertise.

13. That when petitioner was indicted with co-defendants Jerry Gomberg and Martin Hodas, the firm of Kassner & Detsky entered an appearance for all three defendants. This firm had been introduced to petitioner by petitioner's co-defendant, Martin Hodas.

14. That all decisions with regard to the defense of the case were primarily made by the attorneys Kassner & Detsky along with Martin Hodas and petitioner was never consulted or otherwise informed except to be assured that the case would be handled. (Exhibit B, p. 179).

15. At no time was petitioner advised or informed of any potential conflict or that another lawyer would be advisable. (Exhibit B, p. 179).

16. Unknown to petitioner, his counsel filed motions on behalf of Hodas asking for severance and dismissal on the following grounds:

(a) that the indictment be dismissed because Hodas was indicted solely as a result of his "alleged association" with petitioner and co-defendant Gomberg (Exhibit B, p. 12).

(b) that a severance be granted on the grounds that the evidence against petitioner and Gomberg would prejudice the defendant Hodas (Exhibit B, p. 13).

(c) that Hodas' case be severed from petitioner's because "... the testimony of Hodas may be so substantially different than the testimony of Kaplan and Gomberg that any testimony he may give may substantially prejudice Kaplan and Gomberg" (Exhibit B, p. 13).

17. That the above-referred to motions were filed months prior to the commencement of trial, yet notwithstanding the fact that petitioner's own counsel under oath had admitted the existence of a conflict, petitioner was never advised nor did the court make any inquiry of petitioner or counsel at that time.

18. On the morning of trial, the trial court observed, for the first time, that all three defendants were represented by the same counsel and proceeded to inquire of them as to a possible conflict of interest and whether they were satisfied with Kassner as the only attorney. Hodas, the first named defendant in the indictment, assented. The co-defendant Gomberg, next named in the indictment after the court explained conflict of interest, asked to talk to another lawyer. Then before petitioner was asked by the court for his position or given an opportunity to speak, the matter was picked up by the lawyers and after colloquy the trial court ordered the trial to begin. While the colloquy is too long to reproduce here, the court is referred to it in its entirety at Exhibit B, pp. 16-24. Nowhere, however, does counsel inform the court that his firm's defense of Hodas will be that he was merely the co-defendant's landlord and thus without the motive they may possess to commit the arsons charged.

19. The trial court, in spite of the clear warnings that a conflict of interest may have existed, failed to properly interrogate and advise petitioner as to the conflict of interest so that petitioner could knowingly and intelligently exercise his Sixth Amendment right to the assistance of counsel.

20. The trial court, without ever directing this questioning personally to petitioner as he had to the co-defendants, ordered trial to proceed based only on the representation of Mr. Detsky that Hodas had been advised of a possible conflict and all defendants wished to proceed with the firm of Kassner and Detsky (Exhibit B, p. 20). While Hodas may have been so advised, at no time was petitioner advised of a possible conflict by his counsel,

between his defense and that of Hodas (Exhibit B, pp. 178-183). In addition, Detsky's statement that he advised the defendants of the possible conflict is belied by the fact that when the trial court personally interrogated the co-defendant Gomberg and advised him as to what a conflict of interest was, Gomberg asked to speak to another lawyer (Exhibit B, p. 18). The court failed to pursue its interrogation of Gomberg and never even asked petitioner if he understood and consented to the joint representation.

21. That notwithstanding the fact that there was no waiver by petitioner, the case was ordered to proceed to trial with Kassner as trial counsel for all three defendants. As a result of such joint representation, a conflict of interest erupted as predicted by petitioner's own counsel, which prejudiced petitioner's defense.

22. That petitioner's defense and that of Hodas were in conflict and could not be reconciled by one attorney. That in fact the prediction by petitioner's counsel at the time of the motion to sever, that Hodas' testimony could substantially prejudice Kaplan (see ¶16(c), supra), came to pass to such an extent that separate counsel for petitioner and Hodas was essential.

23. That the conflict of interest arose because the prosecution sought to prove that petitioner and Hodas operated a massage parlor, employed the three prosecution witnesses and would have gained from burning down the competition. That in defense of this theory and the witnesses who took the stand, the Hodas defense was that he was only a landlord and not an operator of a massage parlor; that he did not hire or employ the prosecution witnesses; and that he had no motive to have competing massage parlors destroyed.

24. That the Hodas defense of lack of motive reenforced in every way the prosecution claim that petitioner was an operator of a massage parlor, was the employer of the prosecution witnesses and had a motive to burn down the competition. This conflict arose between the Hodas defense and petitioner's defense in the following circumstances, inter alia:

(a) prosecution witnesses were questioned in order to elicit from them the fact that Hodas was not a partner in a massage parlor and did not employ the actual arsonists. Such prosecution witnesses were not challenged when they identified petitioner as an operator of a massage parlor and their employer (Exhibit B, pp. 31-33, 38-39).

(b) the failure to make appropriate objections where the testimony could have been objected to benefitted Hodas and was damaging to petitioner (Exhibit B, pp. 25-28).

(c) defendant Hodas took the stand and testified in his own behalf proving each of the elements of his defense and at the same time confirming the theory of the prosecution's case as to petitioner's involvement (Exhibit B, pp. 48-59; 89-92).

(d) Hodas' bookkeeper took the stand to confirm that Hodas was a landlord and not petitioner's partner and that petitioner was responsible for running the operation, thus further confirming the prosecution's case against petitioner (Exh. B, 45-47).

(e) a potential witness, Jerome Bayarsky, was not called despite the fact that he could have testified in petitioner's behalf. (Exhibit B, pp. 180, 186, 214-220).

(f) petitioner was not called as a witness despite his desire to testify (Exhibit B, pp. 180-182).

(g) during the summation, counsel for petitioner emphasized Hodas' alleged non-involvement and his alleged lack of motive to commit the crime of arson. No such argument was made on behalf of petitioner (Exhibit B, pp. 102-105(a)).

(h) jury charges requested by counsel further emphasized the conflict between petitioner's defense and Hodas' defense (Exhibit B, p. 106).

25. That when Hodas and his bookkeeper took the stand in support of Hodas' defense, no one cross-examined them on behalf of petitioner.

26. That the decision not to call witnesses, including petitioner, was in part dictated and motivated by petitioner's counsel's allegiance to Hodas since such witnesses, including petitioner, would not have enhanced the Hodas defense.

27. That it was impossible for one attorney to represent petitioner and Hodas at the same time when each time the Hodas defense was put forward it left uncontradicted and only served to emphasize petitioner's alleged involvement.

28. That the insensitivity of petitioner's trial counsel to the existence of the conflict of interest does not serve to excuse or relieve the trial court of its obligation where notice of the conflict existed.

29. That the trial court could not and should not have relied upon the equivocal representations of petitioner's counsel with regard to a conflict when:

(a) petitioner's counsel had already filed an affidavit alleging the existence of a conflict;

(b) a co-defendant, when asked by the court about the existence of a conflict of interest, requested another lawyer;

(c) when trial counsel asked for an in camera discussion with the court and District Attorney with regard to the issue;

(d) when counsel had already previously exhibited insensitivity to the issue of conflict of interest since counsel had to be ordered to be relieved of representation of the two accomplice witnesses scheduled to testify against petitioner.

30. That as a result of the conflicts of interest that arose, petitioner's case was prejudiced to such an extent that he was denied a fair trial and the effective assistance of counsel.

31. That as a result, petitioner was denied his constitutional rights under the Fifth, Sixth and Fourteenth Amendments and did not knowingly and intelligently waive such rights.

WHEREFORE, petitioner prays:

- (a) That a writ of habeas corpus be directed to respondent in his behalf;
- (b) That respondent be required to appear and answer the allegations of this petition;
- (c) That this Court relieve petitioner of the unconstitutional detention and imprisonment; and
- (e) That this Court grant such other, further and different relief as to this Court may seem just and proper including release of petitioner on his own recognizance or on bail pending disposition of this application.

KUNSTLER & HYMAN
Attorneys for Relator

By 

A Member of the Firm
Office & P.O. Address
370 Lexington Avenue
New York, N.Y. 10017

VERIFICATION

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.1

GEORGE KAPLAN, being duly sworn, deposes and says:
Deponent is the Relator in the within action;
Deponent has read the foregoing Petition for Writ
of Habeas Corpus, and knows the contents thereof; the same
is true to deponent's own knowledge, except as to the
matters therein alleged upon information and belief, and
those matters deponent believes to be true.

George Kaplan
George Kaplan

Sworn to before me this
28th day of May, 1976

Esmond W. Gifford, Sr.

ESMOND W. GIFFORD, SR.
Notary Public, State of New York
Dutchess County
Commission Expires March 30, 1977

For referral after
Docketing to JUDGE GOETTEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

GEORGE KAPLAN,

Petitioner,

-against-

ROY BOMBARD, Superintendent,
Greenhaven Correctional Facility,

Respondent.

: 75 Civ. 2435
:
: AFFIDAVIT IN
: OPPOSITION TO
: PETITION FOR
: A WRIT OF
: HABEAS CORPUS

RICHARD H. GIRGENTI, being duly sworn, deposes and
states:

1. I am an Assistant District Attorney, of counsel
to ROBERT M. MORGENTHAU, District Attorney of New York County,
attorney for respondent.. This affidavit is submitted in
answer to George Kaplan's petition for a writ of Habeas Corpus
filed with this Court.

2. Upon information and belief, petitioner is in-
carcerated at the Greenhaven Correctional Facility at Storm-
ville, New York, pursuant to a judgment of the Supreme Court
of the State of New York, rendered on April 19, 1974, con-
victing him, after a jury trial of two counts of Arson in the
Second Degree. Petitioner was sentenced to an indeterminate

term of imprisonment not to exceed seven years.

3. Petitioner has exhausted his state remedies.

4. In an accompanying memorandum of law, respondent sets forth his reasons for opposing the instant petition.

5. In addition, respondent submits the following exhibits for this Court's consideration of the merits of the instant petition:

Exh. 1 Printed record, of the proceedings in the state trial court, used on appeal in the Appellate Division, First Department, of the Supreme Court of the State of New York (Vols. I - VI)

Exh. 2 Combined motions, dated August 20, 1973, of defendants George Kaplan, Jerry Gomberg, and Martin Hodas and made in Supreme Court of the State of New York, County of New York

Exh. 3 Affidavit of Seymour S. Detsky, Esq., dated August 20, 1973, in support of motion (Exh. 2).

Exh. 4 Decision and order of Justice Postel, dated September 12, 1973

WHEREFORE, for the reasons set forth in the accompanying memorandum of law, the petition for a writ of habeas corpus should be denied.

RICHARD H. GIRGENTI

Sworn to before me
This _____ day of
_____, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

- PLAINTIFF -

RECEIVED
OCT 1 1976
GEORGE KAPLAN JEFFREY GOMBERG AND
MARILYN ROSENTHAL

DEFENDANTS.

-----X COMBINED MOTIONS

- A. DISCOVERY AND INSPECTION
- B. BRADY MATERIAL
- C. BILL OF PARTICULARS
- D. STATEMENTS OF DEFENDANTS
- E. GRAND JURY PROCEEDINGS
- F. GOVERNMENT INFORMER
- G. INSUFFICIENCY OF INDICTMENT
- H. OTHER RELIEF

S I R S :

PLEASE TAKE NOTICE, THAT, UPON THE AFFIDAVIT OF SEYMOUR S. DETSKY,
DULY SWORN TO JULY 11, 1973, AND THE INDICTMENT HEREIN, AND UPON ALL OF THE PAPERS
PROCEEDINGS AND PLEADINGS HERETOFORE HAD HEREIN, THE UNDERSIGNED WILL APPLY TO
THIS COURT BEFORE A JUSTICE PRESIDING AT TRIAL TERM PART THIRTY THEREOF TO BE HELD
IN AND FOR THE COUNTY OF NEW YORK AT THE SUPREME COURT COURT HOUSE LOCATED AT
100 CENTRE STREET IN THE BOROUGH OF MANHATTAN CITY COUNTY AND CITY OF NEW YORK
ON AUGUST 1, 1973 AT 9:30 A.M. O'CLOCK IN THE FORENOON OF THAT DAY OR AS SOON
THEREAFTER AS COUNSEL CAN BE HEARD, FOR THE FOLLOWINGS:

A.

DISCOVERY AND INSPECTION

DEFENDANT HEREIN MOVES PURSUANT TO SECTION 240 OF THE CRIMINAL PROCEDURE LAW,
FOR AN ORDER PERMITTING HIM TO INSPECT AND COPY OR PHOTOGRAPH ALL MATERIAL IN
POSSESSION OF OR IN CUSTODY OR CONTROL OF THE OFFICE OF THE DISTRICT ATTORNEY.

IT IS RESPECTFULLY SUBMITTED THAT ALL SUCH MATERIAL IS ESSENTIAL AND ABSOLUTELY
NECESSARY TO AN ADEQUATE PREPARATION OF THE DEFENSE HEREIN. I RESPECTFULLY SUBMIT
THAT THE REQUEST HEREIN IS MOST REASONABLE.

IT IS FURTHER REQUESTED THAT ANY DISCLOSURES MADE BY THE PEOPLE OF THE STATE
OF NEW YORK OR THE OFFICE OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK BE
MADE SOLELY TO THE COURT AND TO DEFENSE COUNSEL AND THAT THE CONTENTS OF ANY

MATERIALS SO DISCLOSED SHALL NOT BE MADE PUBLIC OR REVEALED TO THE PUBLIC OR MADE AVAILABLE TO ANY OTHER PERSON AND THAT DISCLOSURE SO ORDERED BY THIS COURT BE MADE OUTSIDE THE PRESENCE OF ANY REPRESENTATIVES OF THE STATE OF NEW YORK. THIS REQUEST IS MADE SO THAT THERE IS NO VIOLATION OF THE ATTORNEYS' WORK PRODUCT RULE THROUGH OBSERVATIONS BY STATE REPRESENTATIVES OF THE MANNER IN WHICH THE DEFENSE HAS PREPARED THEIR CASE. THUS, DISCOVERY IS REQUESTED AS TO THE FOLLOWING ITEMS:

1. ALL MATERIALS, OF WHATEVER DESCRIPTION, CHARGED IN THE INDICTMENT, UNDER WHICH EACH OF THE DEFENDANTS INDIVIDUALLY AND OR COLLECTIVELY ARE SAID TO HAVE PROMOTED OR PARTICIPATED IN AN ALLEGED ARSEN COMMITTED ACCORDING TO THE INDICTMENT ON JULY 25, 1972.
2. ALL STATEMENTS CLAIMED TO HAVE BEEN MADE BY ANY OF THE DEFENDANTS INDIVIDUALLY OR COLLECTIVELY RELATING TO THE ALLEGED ARSEN COMMITTED ON A BUILDING OWNED BY LOUIS POSNANSKY.
3. COPIES OF ALL STATEMENTS EITHER IN WRITING OR ORALLY ALLEGED PARTICIPATION IN SUCH ALLEGED ARSEN.
4. WITH RESPECT TO THE DEFENDANT, GEORGE KAPLAN, SET FORTH IF THE PEOPLE HAVE IN ITS POSSESSION ANY BOOKS, RECORDS OR ANY OTHER CORRESPONDENCE OR COMMUNICATION OF SAID DEFENDANT, KAPLAN.
5. WITH RESPECT TO THE DEFENDANT, JERRY GOMBERG, SET FORTH IF THE PEOPLE OR THE DISTRICT ATTORNEY IS IN POSSESSION BY VIRTUE OF SEIZURE OF ANY BOOKS OR RECORDS OR ANY CORRESPONDENCE OR COMMUNICATIONS OF SAID DEFENDANT, GOMBERG.
6. WITH RESPECT TO THE DEFENDANT, HODAS, SET FORTH IF THE PEOPLE AND OR THE DISTRICT ATTORNEY IS IN RECEIPT BY WAY OF SEIZURE OF ANY BOOKS OR RECORDS OR ANY OTHER CORRESPONDENCE OR COMMUNICATIONS OF THE SAID DEFENDANT, HODAS.
7. DISCLOSURE OF WHETHER THERE WAS ANY ELECTRONIC SURVEILLANCE OF ANY FORM OR TYPE IN ANY WAY RELATING TO THIS CASE WHICH MAY HAVE BEEN CONDUCTED BY EITHER FEDERAL OR STATE OFFICERS OR OFFICERS OF THE CITY AND COUNTY OF NEW YORK. IN THE EVENT THERE WAS ANY SUCH SURVEILLANCE, COUNSEL RESERVES THE RIGHT TO MAKE ADDITIONAL

APPLICATION FOR FURTHER DETAILS SURROUNDING THE CIRCUMSTANCES OF SUCH SURVEILLANCE.

8. DISCLOSURE OF WHETHER THERE WAS ANY ELECTRONIC OR MECHANICAL SURVEILLANCE OR EAVESDROPPING OF CONVERSATIONS BETWEEN ANY OF THE DEFENDANTS OR ANY OF THE DEFENDANTS AND THEIR ATTORNEYS AND THE DATES OF SUCH SURVEILLANCE, AND A TRANSCRIPTION OF ALL SUCH EAVESDROPPING UPON CONVERSATIONS BETWEEN EACH OF THE DEFENDANTS AND BETWEEN EACH OF THE DEFENDANTS AND THEIR ATTORNEYS.

9. SET FORTH SPECIFICALLY IF THERE WAS ANY ELECTRONIC OR MECHANICAL SURVEILLANCE OR EAVESDROPPING ON THE HOME TELEPHONE OF ANY ONE OF THE DEFENDANTS HEREIN.

10. SET FORTH IF THERE WAS ANY ELECTRONIC OR MECHANICAL SURVEILLANCE OR EAVESDROPPING ON ANY BUSINESS TELEPHONE OF ANY OF THE INDIVIDUAL DEFENDANTS HEREIN.

IF THERE WAS ANY ELECTRONIC SURVEILLANCE OR MECHANICAL SURVEILLANCE OR EAVESDROPPING OF CONVERSATIONS, SET FORTH IN DETAIL THE NATURE OF SUCH EAVESDROPPING OF CONVERSATIONS, AND A FULL TRANSCRIPTION THEREOF.

11. IN THE EVENT SCIENTIFIC REPORTS ARE AVAILABLE WITH RESPECT TO WHAT CAUSED A FIRE AT THE PREMISES SET FORTH IN THE INDICTMENT, OR HOW THE FIRE CAME ABOUT, OR WHAT EVIDENCE THERE IS TO INDICATE HOW THE FIRE WAS STARTED, DEFENDANTS DEMAND COPIES OF ANY AND ALL SUCH REPORTS OR THE RESULTS OF ANY SUCH SCIENTIFIC TEST OR EXPERIMENTS MADE IN CONNECTION THEREWITH, BE FURNISHED TO THE ATTORNEYS FOR THE SAID DEFENDANTS.

12. IN THE EVENT THERE EXIST REPORTS RELATING TO VOICE RECORDINGS OF THE DEFENDANTS OR EACH OF THEM, HANDWRITING SAMPLES OF THE DEFENDANTS COLLECTIVELY OR EACH OF THEM, PHOTOGRAPHS OR ANY OTHER SUCH MATERIAL IN THE POSSESSION, CUSTODY OR CONTROL OF THE PEOPLE, INCLUDING ANY REPORTS RELATING TO COMMUNICATIONS, CORRESPONDENCE OR OTHER MATERIALS WHICH MAY FORM THE BASIS OF THIS INDICTMENT SHOULD BE FORTH WITH MADE KNOWN TO THE ATTORNEYS FOR THE DEFENDANTS HEREIN.

13. COPIES OF ANY AND ALL DOCUMENTS, PHOTOGRAPHS, PAPERS, TANGIBLE OBJECTS OR OTHER MATERIALS SHOWING ALLEGED SCENES OR PLACES OF MEETINGS OF THE DEFENDANTS INDIVIDUALLY AND OR COLLECTIVELY OR IN ANY OTHER AREA WHERE IT IS CLAIMED THAT THE

WERE ACTUALLY CONTAINED AND WHAT REPORTS THERE ARE NOW IN THE POSSESSION OF THE NEW YORK CITY POLICE DEPARTMENT WITH RESPECT TO SUCH REPORTS, PAPERS AND RECORDS ON FILE RESPECTING THIS PARTICULAR PROCEEDING.

20. THAT THE PEOPLE OF THE STATE OF NEW YORK PROVIDE COPIES OF ALL PRESS RELEASES THAT WERE ISSUED TO THE PRESS RELATING TO THE INDICTMENT OF EACH OF THE DEFENDANTS NAMED HEREIN.

21. SET FORTH THE NAMES AND ADDRESSES OF EACH AND EVERY WITNESS WHO WILL BE CALLED BY THE PEOPLE OF THE STATE OF NEW YORK WITH RESPECT TO ANY ASPECT OF THE CASE INVOLVING ANY OF THE DEFENDANTS HEREIN.

22. SET FORTH IN WHAT MANNER IT IS CLAIMED THAT THE DEFENDANT, GEORGE KAPLAN IS ALLEGED TO HAVE COMMITTED ARSEN ON JULY 25, 1972 OF A BUILDING OWNED BY LOUIS POSNANSKY.

23. SET FORTH IN WHAT MANNER IT IS CLAIMED THE DEFENDANT JERRY GOMBERG IS ALLEGED TO HAVE COMMITTED ARSEN ON A BUILDING OWNED BY LOUIS POSNANSKY AS SET FORTH IN THE FIRST COUNT OF THE INDICTMENT.

24. SET FORTH IN WHAT MANNER IT IS CLAIMED THE DEFENDANT MORTON HODAS PARTICIPATED IN ACTED UPON OR COMMITTED THE ARSEN SET FORTH IN THE FIRST COUNT OF THE INDICTMENT.

25. SET FORTH IN WHAT MANNER IT IS CLAIMED THE DEFENDANTS ACTED COLLECTIVELY IN COMMITTING THE ARSEN SET FORTH IN THE FIRST COUNT OF THE INDICTMENT.

26. SET FORTH IF THE PEOPLE OF THE STATE OF NEW YORK INTEND TO PROVE THAT THE DEFENDANTS ACTED COLLECTIVELY OR WHETHER MORTON HODAS ACTED AS AN AGENT FOR ANY OF THE OTHER DEFENDANTS OR WHETHER ANY OF THE OTHER DEFENDANTS ACTED AS AN AGENT FOR MORTON HODAS OR FOR ONE OF THE OTHER DEFENDANTS NAMED IN THIS INDICTMENT.

27. SET FORTH IN WHAT MANNER IT IS CLAIMED THE DEFENDANT MORTON HODAS WAS AT OR NEAR THE SCENE OF THE ARSEN ON JULY 25, 1972 AS SET FORTH IN THE FIRST COUNT OF THE INDICTMENT.

28. IF THE DEFENDANT, MORTON HODAS IS NOT CLAIMED TO HAVE BEEN AT THE SCENE

OF THE WITNESSES PROPOSED TO BE PRESENTED TO THE COURT BY THE PEOPLE OF THE STATE OF NEW YORK AGAINST ANY OF THE DEFENDANTS INVOLVED IN THIS ACTION.

34. SET FORTH IF THE PEOPLE OF THE STATE OF NEW YORK HAVE MADE USE OF UNDERCOVER AGENTS WITH RESPECT TO ANY OF THE INCIDENTS, THAT ARE CLAIMED TO HAVE TAKEN PLACE ON JULY 25, 1972.

35. SET FORTH IF THE PEOPLE OF THE STATE OF NEW YORK INTEND TO PRESENT AS PART OF THEIR EVIDENCE WITNESSES UNDERCOVER AGENTS WHO WORKED, OR WHO WERE ASSOCIATED WITH ANY OF THE DEFENDANTS IN THE INSTANT CASE INDIVIDUALLY AND OR COLLECTIVELY, AND IF SO THE PERIOD OF TIME OF SUCH ASSOCIATION, AND THE NATURE OF WHAT EMPLOYMENT SUCH UNDERCOVER AGENT IS ALLEGED TO HAVE HAD WHILE IN THE EMPLOY OF EACH OF THE DEFENDANTS OR ANY OF THEM OR ALL OF THEM COLLECTIVELY.

36. SINCE COUNSEL FOR EACH OF THE DEFENDANTS HEREIN IS STILL INVESTIGATING ALL OF THE FACTUAL CIRCUMSTANCES SURROUNDING THIS ACTION, IT IS MOST RESPECTFULLY SUBMITTED THAT ALL RIGHTS ON THE PART OF THE ATTORNEYS FOR DEFENDANTS TO REQUEST OTHER FACTUAL DETAILS TO BE FURNISHED WHICH FACTUAL DETAILS ARE RELEVANT TO THE INDICTMENT HEREIN AND WHICH ARE NECESSARY FOR THE PROPER PREPARATION OF THE DEFENSE HEREIN. COUNSEL FURTHER RESPECTFULLY RESERVES THE RIGHT TO MAKE ANY ADDITIONAL REQUEST FOR MATERIAL COVERED BY SECTION 240.20 OF THE CRIMINAL PROCEDURE LAW AT THE TIME THIS MOTION IS ARGUED.

B.

BRADY MATERIAL

1. IT IS MOST RESPECTFULLY REQUESTED THAT THE PEOPLE AND THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK BE DIRECTED AND ORDERED TO PRODUCE AND TO DELIVER TO THE DEFENDANTS AND OR THEIR COUNSEL HEREIN, ALL EVIDENCE FAVORABLE TO THE ACCUSED AND WHICH BEARS UPON THE ISSUES RAISED BY THE INDICTMENT HEREIN AND WHICH EVIDENCE SAID PEOPLE OR THE DISTRICT ATTORNEY'S OFFICE MAY HAVE IN EITHER THEIR POSSESSION, CUSTODY OR CONTROL, ALL PURSUANT TO THE AUTHORITY OF BRADY VS. MARYLAND, 373 U.S. 83.

OF THE ARSEN ON JULY 25, 1972, THEN SET FORTH IN WHAT MANNER IT IS CLAIMED THAT MORTON HODAS IS CONNECTED WITH THE ARSEN THAT OCCURRED ON JULY 25, 1972.

29. SET FORTH IN WHAT MANNER IT IS CLAIMED THE DEFENDANT, GEORGE KAPLAN WAS AT THE SCENE OF THE ARSEN AS SET FORTH IN THE FIRST COUNT OF THE INDICTMENT. IF IT IS CLAIMED THAT THE SAID DEFENDANT, GEORGE KAPLAN WAS NOT AT THE SCENE WHEN THE ARSEN WAS COMMITTED TO WITH ON JULY 25, 1972 AS SET FORTH IN THE FIRST COUNT OF THE INDICTMENT, SET FORTH IN WHAT MANNER IT IS CLAIMED THE DEFENDANT WAS AT THE SCENE OR NEAR THE SCENE OR KNEW OF THE ARSEN THAT TOOK PLACE ON JULY 25, 1972.

30. SET FORTH IF IT IS CLAIMED THAT THE DEFENDANT, JERRY GOMBERG WAS AT THE SCENE OF THE ALLEGED ARSEN THAT IS CLAIMED TO HAVE TAKEN PLACE ON JULY 25, 1972 AND HOW THE DEFENDANT, JERRY GOMBERG WAS AT THE SCENE, AND WHAT IS IT CLAIMED THAT SAID JERRY GOMBERG WAS DOING AT THE SCENE OF THE ARSEN.

31. IF THE DEFENDANT, JERRY GOMBERG WAS NOT AT THE SCENE OF THE ARSEN ON JULY 25, 1972, THEN SET FORTH IN WHAT MANNER IT IS CLAIMED THAT THE SAID DEFENDANT, JERRY GOMBERG KNEW OF THE SAID ARSEN, WAS ACQUAINTED WITH THE SAID ARSEN, ALLEGEDLY PARTICIPATED IN THE SAID ARSEN OR IN SOME WAY BECAME CONNECTED WITH THE SAID ARSEN THAT WAS ALLEGEDLY COMMITTED ON JULY 25, 1972.

32. IF ANY OF THE WITNESSES THAT THE PEOPLE OF THE STATE OF NEW YORK INTEND TO PRODUCE AGAINST EACH OF THE DEFENDANTS HEREIN INDIVIDUALLY AND OR COLLECTIVELY HAVE EVER BEEN CONFINED TO A MENTAL HOSPITAL, OR HAVE EVER BEEN THE RECIPIENT OF PSYCHIATRIC TREATMENT, SET FORTH THE NAME OF THE MENTAL HOSPITAL IN WHICH THEY WERE CONFINED, THE LENGTH OF TIME OF THEIR CONFINEMENT, THE DIAGNOSIS OF THEIR MENTAL AILMENT OR DISEASE, AND WHEN SUCH WITNESSES WERE ALLEGEDLY RELEASED AS "CURED" FROM SUCH MENTAL HOSPITALS. IF ANY OF THE WITNESSES ARE UNDER PSYCHIATRIC TREATMENT, OR HAVE RECEIVED PSYCHIATRIC TREATMENT, SET FORTH THE LENGTH OF TIME THAT SUCH PSYCHIATRIC TREATMENT LASTED, OR WHETHER SUCH PSYCHIATRIC TREATMENT STILL CONTINUES, WHAT IS THE DIAGNOSIS OF SUCH PSYCHIATRIST WITH RESPECT TO THE MENTAL, EMOTIONAL OR OTHER AILMENTS AFFLICTING SUCH WITNESSES, AND WHEN AND WHERE SUCH CURE IF ANY WAS AFFECTED FOR EACH OF SAID WITNESSES.

33. SET FORTH THE NAME AND ADDRESS OF EACH PSYCHIATRIST WHO HAS TREATED ANY

AND HIS RESPECTIVE RELATIONSHIP TO THE ALLEGED ARSEN SET FORTH IN THE FIRST COUNT OF THE INDICTMENT. THE STATEMENTS OF ANY SUCH WITNESSES WHO FURNISHED STATEMENTS TO THE PEOPLE AND TO THE OFFICE OF THE DISTRICT ATTORNEY OF THE CITY OF NEW YORK OR POLICE OFFICERS OF THE CITY OF NEW YORK OR TO ANY FIRE MARSHALS OF THE CITY OF NEW YORK SHOULD BE TURNED OVER TO THE DEFENDANTS HEREIN AND OR THEIR COUNSEL SO THAT SUCH WITNESSES CAN BE INTERVIEW BY THE TO COUNSEL TO DEFENDANTS IN ORDER TO DETERMINE, IN ADVANCE OF TRIAL, WHETHER THESE WITNESSES SHOULD BE CALLED UPON ON BEHALF OF THE DEFENSE.

4. IF THE PEOPLE AND THE OFFICE OF THE DISTRICT ATTORNEY OF NEW YORK COUNTY HAVE IN THEIR POSSESSION ANY LEASES, OR ANY CONTRACTUAL AGREEMENTS EXISTING BETWEEN THE RESPECTIVE DEFENDANTS, SET FORTH TRUE AND CORRECT COPIES THEREOF.

5. IF THE PEOPLE OF THE STATE OF NEW YORK AND THE OFFICE OF THE DISTRICT ATTORNEY OF NEW YORK COUNTY AND THE NEW YORK CITY POLICE DEPARTMENT HAVE IN THEIR POSSESSION MATERIAL, DOCUMENTS, LETTERS, COMMUNICATION, TELEPHONIC EAVES-DROPPING AND COMMUNICATIONS WHICH HAVE BEEN INTERCEPTED, WHICH INDICATE QUITE CLEARLY THE RELATIONSHIP OF EACH OF THE DEFENDANTS TO THE OTHER, SET FORTH TRUE AND CORRECT COPIES AND TRANSCRIPTIONS THEREOF.

6. IF THE PEOPLE OF THE STATE OF NEW YORK AND THE OFFICE OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ARE IN RECEIPT OF ANY SPECIFIC WRITTEN COMPLAINTS FROM ANY THIRD PARTIES CONCERNING EACH OF THE DEFENDANTS HEREIN, AND THEIR RELATIONSHIP TO THE ALLEGED ARSEN, KINDLY SET FORTH TRUE AND CORRECT COPIES THEREOF.

7. IT IS RESPECTFULLY SUBMITTED THAT IF THE DEFENDANTS ARE COMPELLED TO WAIT UNTIL THE TIME THEIR TRIAL COMMENCES, AND THE TRIAL OF THIS ACTION IS NOW SET FOR SEPTEMBER 12, 1973, WHICH IS A CONSIDERABLY SHORT TIME, IT MAY BE TOO LATE FOR EACH OF THEM OR ALL OF THEM TO MAKE CONTACT WITH THE WITNESSES AND TO EXPLORE WITH THE WITNESSES WHAT ARE THE FACTUAL CIRCUMSTANCES SURROUNDING THE ALLEGED ARSEN SET FORTH IN THE FIRST COUNT OF THE INDICTMENT. THEREFORE, IT IS MOST URGENT AND IMPERATIVE, THAT THE EVIDENCE IN THE GOVERNMENT'S FILE WHICH IS FAVORABLE TO THE DEFENSE HEREIN OR TO ANY OF THE DEFENDANTS HEREIN THAT THE SAME BE IMMEDIATELY DISCLOSED AND REVEALED TO THE DEFENDANTS AND OR THEIR RESPECTIVE

COUNSEL SO THAT ARRANGEMENTS CAN BE MADE FOR SUCH WITNESSES TO BE CALLED DURING THE TRIAL OF THIS ACTION.

8. SET FORTH IF THE PEOPLE OF THE STATE OF NEW YORK AND OR THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK KNOWS OF ANY WITNESSES WHOSE LIFE HAS BEEN ALLEGEDLY THREATENED BY ANY OF THE DEFENDANTS HEREIN. IF SO SET FORTH THE DATES WHEN IT IS CLAIMED THAT SUCH THREATS WERE MADE, BY WHOM THEY WERE MADE, WHEN THEY WERE MADE AND THE MANNER AND CIRCUMSTANCES UNDER WHICH THEY WERE MADE. IN THE EVENT THAT THE PEOPLE CLAIM THAT THEY HAVE WITNESSES WHO CLAIM THAT THEY HAVE BEEN THREATENED, BUT WHERE SUCH WITNESSES HAVE GIVEN STATEMENTS FAVORABLE TO THE ACCUSED HEREIN, IT IS RESPECTFULLY SUBMITTED THAT THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK AND THE PEOPLE OF THE STATE OF NEW YORK ARE REQUIRED TO SET FORTH THE NATURE OF SUCH STATEMENTS, WHEN AND WHERE THEY WERE MADE AND WHAT WAS ACTUALLY SAID.

IT IS RESPECTFULLY SUBMITTED THAT UNDER THE RULES OF BRADY VS. MARYLAND, THE GOVERNMENT WOULD UNDERGO NO HARDSHIP IN PRESENTING THESE FACTS. USUALLY CLAIMS ARE MADE BY THE PEOPLE THAT WITNESSES HAVE BEEN THREATENED BUT SUCH CLAIMS IT HAS BEEN SHOWN IN THE PAST ARE WOEFULLY EXAGGERATED AND IS MERELY A PLOY TO KEEP DEFENDANTS UNDER HEAVY LAIL AND PREVENT THEIR RELEASE FROM JAIL ON BAIL.

9. SET FORTH THE NAMES OF ALL PEOPLE WHO HAVE BEEN INTERROGATED BY THE PEOPLE, THE OFFICE OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK AND OR THE FIRE MARSHAL'S OFFICE OF THE CITY OF NEW YORK, WHO HAVE BEEN INTERROGATED WITH RESPECT TO THE ALLEGED ARSEN THAT TOOK PLACE ON JULY 25, 1972 AS SET FORTH IN THE INDICTMENT AND SET FORTH THE STATEMENTS THAT WERE MADE BY ALL OF THOSE PEOPLE INTERVIEWED INCLUDING THOSE WHO STATED FRANKLY THAT THEY KNEW OF NO ARSEN, THAT THE DEFENDANTS WERE NOT CONNECTED WITH ANY SUCH ARSEN, AND THAT THE DEFENDANTS HAD NOTHING TO DO WITH SUCH ARSEN. SET FORTH EACH AND EVERY STATEMENT MADE BY EACH AND EVERY PERSON INTERVIEWED WITH RESPECT TO EACH OF THE DEFENDANT, AND WHAT IS KNOWN ABOUT THEM IN THE NEIGHBORHOOD WHERE THE ARSEN IS ALLEGED TO HAVE TAKEN PLACE AND WHAT WAS

SAID ABOUT THEM SUBSEQUENT TO THE COMMISSION OF THE ALLEGED ARSEN AND BY WHOM IT WAS SAID.

10. THAT SUCH STATEMENTS IS RESPECTFULLY SUBMITTED OR REQUIRED TO BE MADE WHERE THERE REFLECT UPON THE INNOCENT OR GUILT OF THE DEFENDANT AND ARE IMPORTANT IN CONNECTION WITH THE TRIAL WITH RESPECT TO THE SAME.

11. IT IS RESPECTFULLY SUBMITTED THAT WHEN A PERSON IS ULTIMATELY CHARGED WITH A CRIME, THE FINDINGS OF THE LAW ENFORCEMENT AGENCY INVOLVED SHOULD BE AS READILY AVAILABLE TO THE DEFENDANTS AS WELL AS TO THE PROSECUTION, SINCE WE MUST BE MINDFUL THAT THE SEARCH OF THE DISTRICT ATTORNEY'S OFFICE AS WELL AS ALL PERSONS EMPLOYED THEREIN SEEK ONLY FAIRNESS AND JUSTICE FOR ALL, THAT NO ONE OF THEM SHOULD HAVE A PRIORITY UPON SEEKING TO PRESS CHARGES AGAINST ANY OF THE DEFENDANTS INVOLVED IN THIS ACTION.

CONCEDECELY THERE IS NOTHING WRONG WITH THE DEFENDANTS, THERE PLACE ABOVE AND THE MANNER IN WHICH THEY CONDUCT THEIR BUSINESS.

IT IS RESPECTFULLY SUBMITTED THAT WHEN POLICE INVESTIGATE A CRIME THEY DO SO NOT ONLY FOR THE PURPOSES OF CONVICTING THE GUILTY BUT ALSO MORE HOPEFULLY TO OBTAIN SUFFICIENT FACTS SO THE INNOCENT MAY BE FREED AS WELL. FOR ALL OF THESE REASONS, ANY EVIDENCE NOW IN THE FILE OF THE GOVERNMENT, WHICH IS FAVORABLE TO THE DEFENDANT, WHETHER IT BE DOCUMENTARY, STATEMENTS OF WITNESSES OR ANY OTHER FORM, SHOULD BE, IN ALL RESPECT, DELIVERED TO THE DEFENDANT OR HIS ATTORNEYS AT THIS MOMENT SO THAT THEY CAN BE AFFECTIVELY APPRISED OF THE FACT THAT THEY ARE TO USE THE DICTAPHONE WHICH CAN BE AFFECTIVELY USED IN CONNECTION WITH THE SEPARATION OF THE PARTIES HEREIN AND THEIR EVENTUAL DEFENSE. THE DECISION OF WHAT MATERIAL EXIST IN THE GOVERNMENT'S FILE THAT MAY BE FAVORABLE TO THE DEFENSE CANNOT BE LEFT TO THE DECISION OF THE PEOPLE OF THE STATE OF NEW YORK AND ITS DISTRICT ATTORNEY OR ANY OTHER PART OF GOVERNMENT OR TO ITS OFFICERS OR OFFICIALS THEREOF BUT MUST BE PROPERLY AND APPROPRIATELY SUPERVISED BY THIS COURT IN THE PRESENCE OF DEFENSE COUNSEL.

12. IT IS RESPECTFULLY SUBMITTED THAT THE PEOPLE OF THE STATE OF NEW YORK

AND OFFICIALS OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK MAY HAVE INTERROGATED MEN AND WOMEN AS PROSPECTIVE WITNESSES AGAINST DEFENDANTS AND THAT SUCH PROSPECTIVE WITNESSES HAVE CRIMINAL RECORDS OR HAVE CRIMINAL CHARGES PENDING AGAINST THEM AND THAT THE AFORESAID OFFICERS AND REPRESENTATIVES REFERRED TO HAVE PROMISED SUCH PROSPECTIVE WITNESSES THAT IF THEY GIVE EVIDENCE AGAINST EACH OF THE DEFENDANTS OR ALL OF THEM, THAT THE GOVERNMENT MAY WAIVE PROSECUTION OF EXISTING CHARGES AGAINST SUCH WITNESSES, OR ELSE SUBSTANTIALLY REDUCE SUCH CHARGES, OR ELSE FURNISH SUCH PLEA BARGAINING IN OPEN COURT FOR THEM THAT THEY WILL ESCAPE PUNISHMENT THAT THEY JUSTLY DESERVE BECAUSE OF THE EVIDENCE THAT THEY HAVE FURNISHED OR ARE WILLING TO FURNISH AGAINST EACH OF THE DEFENDANTS OR ALL OF THEM HEREIN. THAT IT IS THE DUTY OF THE DISTRICT ATTORNEY AND AN OBLIGATION IMPOSED UPON THEM AS A MATTER OF LAW UNDER THE CASES OF BRADY VS. MARYLAND AND ITS PROGENY THAT THE OFFICE OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK SET FORTH THE NAMES OF SUCH WITNESSES OF THE WITHDRAWAL OF PUNISHMENT OR THE LOWERING OR REDUCTION OF CHARGES AGAINST THEM IF THEY TURN STATES EVIDENCE AND WHICH OF THOSE WITNESSES HAVE AFFECTIVELY AGREED TO TURN STATES EVIDENCE OR TO BECOME INFORMANTS AGAINST THE DEFENDANTS HEREIN IN RETURN FOR THE PROMISES SO MADE TO THEM BY THE OFFICE OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

13. ALL WITNESSES INTERVIEWED BY THE FIRE MARSHAL OF THE CITY OF NEW YORK RESPECTING THE ALLEGED FIRE OF JULY 25, 1972, AND ALL STATEMENTS MADE BY THE FIRE MARSHAL TO SUCH WITNESSES THREATENING THEM WITH DIRE PUNISHMENT IN THE EVENT THEY REFUSE TO MAKE STATEMENTS TO SUCH FIRE MARSHAL, AND THE RESISTANCE OF SUCH WITNESSES TO MAKE SUCH STATEMENTS BECAUSE THEY KNEW THAT SUCH STATEMENTS MAY NOT BE TRUE, SHOULD BE REVEALED TO THE DEFENDANTS HEREIN AND THEIR COUNSEL.

14. ALL CONVERSATIONS OVERHEARD BY THE FIRE MARSHAL OF THE CITY OF NEW YORK OR ANY OTHER POLICE AGENCY BY VIRTUE OF ELECTRONIC SURVEILLANCE, OR BY VIRTUE OF EAVESDROPPING WHETHER WITH OR WITHOUT THE EXISTENCE OF ANY WARRANT, SHOULD BE MADE AVAILABLE TO THE DEFENDANTS WHERE SUCH ELECTRONIC SURVEILLANCE WAS MADE

TAP OR EAVESDROP OF A CONVERSATION OR CONVERSATIONS TO WHICH THE DEFENDANTS OR ANY OF THEM WAS A PARTY OR WHICH OCCURRED IN ANY PREMISES ON WHICH THE DEFENDANTS HAD BUSINESSES LOCATED, AND WHICH THEIR FAMILIES HAD BUSINESSES LOCATED OR THROUGH ANY FACILITY OR FACILITIES OWNED OR LEASED BY THEM OR IN WHICH ANY OF THEM HAD ANY PROPRIETARY INTEREST.

2. STATE WHETHER THE PEOPLE OF THE STATE OF NEW YORK OR THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK INTENDS TO OFFER INTO EVIDENCE ANY STATEMENTS IMPLICATING THE DEFENDANTS OR ANY OF THEM IN THE COMMISSION OF ANY CRIME OR CRIMES CHARGED BY ANY CO-DEFENDANT OR BY ANY ALLEGED ACCOMPLICE PRESENTLY KNOWN TO THE PEOPLE OF THE STATE OF NEW YORK AND OR TO THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK AND WHICH CO-DEFENDANT OR ALLEGED ACCOMPLICE THE GOVERNMENT MAY EITHER CALL AS A WITNESS OR MAY NOT CALL AS A WITNESS AT THE TRIAL AND IF SO STATE THE FOLLOWING:

(A) THE NAME OR NAMES OF THE PERSON OR PERSONS WHO MADE ANY SUCH ALLEGED STATEMENTS AND,

(B) THE CONTENTS OF ANY SUCH STATEMENTS ALLEGEDLY MADE.

3. STATE WHETHER ANY OF THE ALLEGED CO-DEFENDANTS OR ANY OF THE ALLEGED ACCOMPLICES WHO MADE STATEMENTS TO THE PEOPLE OF THE STATE OF NEW YORK, OR TO THE COUNTY DISTRICT ATTORNEY, OR TO ANY OTHER POLICE AGENCY, WERE IN WRITING OR WERE DRAFTED IN WRITING BY SUCH POLICE AGENCY AND THEREAFTER EXECUTED AND SIGNED BY SUCH ALLEGED CO-DEFENDANT AND OR ALLEGED ACCOMPLICE.

4. STATE WHETHER THE INDICTMENT, IN ITS FINAL FORM, WAS DRAFTED BY THE PROSECUTING ATTORNEY BEFORE THE GRAND JURY VOTED TO EVEN RETURN AN INDICTMENT.

5. STATE WHETHER THE INDICTMENT IN ITS FINAL FORM, WHETHER IT WAS EXHIBITED OR READ VERBATIM TO EACH OF THE GRAND JURORS WHO VOTED TO RETURN IT BEFORE THAT VOTE WAS TAKEN.

6. STATE WITH RESPECT TO EACH COUNT THAT THE INDICTMENTS CONTAINS, WHETHER THE GRAND JURY HEARD FROM ANY ALLEGED ACCOMPLICES OF THE DEFENDANTS OR ANY OF THEM.

DEFENDANTS DID SET FIRE TO PREMISES CLAIMED TO BE OWNED BY A MAN NAMED LOUIS POZNANSKY AND MORE PARTICULARLY SET FORTH AND DESCRIBED IN COUNT ONE OF THE INDICTMENT.

14. STATE WHETHER ANY EVIDENCE WAS PRESENTED TO THE GRAND JURY CONCERNING THE PERSONAL HISTORY AND BACKGROUND OF EACH OF THE DEFENDANTS HEREIN. IF SO HOW GREAT A LENGTH OF TIME WAS THE DEFENDANTS PERSONAL BACKGROUND DISCUSSED AND EXPLORED.

15. STATE WHETHER ANY WIRE TAP EVIDENCE WAS PRESENTED TO THE GRAND JURY AND IF SO, BETWEEN WHOM SUCH CONVERSATIONS THAT WERE OVERHEARD TOOK PLACE WHEN THEY TOOK PLACE AND WHERE THEY TOOK PLACE.

16. STATE WHETHER ANY EVIDENCE WAS PRESENTED TO THE GRAND JURY TENDING TO SHOW THE BACKGROUND OF EACH OF THE DEFENDANTS INVOLVED HEREIN AND IF SO, WHAT WAS THE NATURE OF THE TESTIMONY PRESENTED CONCERNING THE BACKGROUND OF EACH OF THE DEFENDANTS HEREIN.

17. WHETHER ANY WITNESSES WHO ARE COOPERATING WITH THE GOVERNMENT IN CONNECTION WITH THIS CASE WHO HAVE BEEN ACTING AS UNDERCOVER AGENTS WERE CALLED AS WITNESSES BEFORE THE GRAND JURY AND WHETHER THEY ARE THE SAME PERSONS WHO WILL BE CALLED AS WITNESSES AT THE TRIAL.

D.

STATEMENTS OF DEFENDANT

1. IN THE EVENT THAT PEOPLE OF THE STATE OF NEW YORK OR THE DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK WILL OFFER IN EVIDENCE AGAINST THE DEFENDANTS ANY STATEMENTS OR STATEMENT ALLEGEDLY MADE BY ANY OF THE DEFENDANTS HEREIN, A FULL AND COMPLETE HEARING IS REQUESTED TO INVESTIGATE THE MATTERS, FACTS AND CIRCUMSTANCES SURROUNDING THE TAKING OF SUCH STATEMENTS FROM ONE OF THE DEFENDANTS.

2. THE HEARING IS NECESSARY IN ORDER TO DETERMINE WHETHER THE STATEMENTS WERE ACQUIRED OR OVERHEARD IN SUCH A MANNER AS TO VIOLATE THE DEFENDANTS RIGHTS UNDER THE UNITED STATES CONSTITUTION OR THE UNITED STATES STATUTES OR IN THE CASES DECIDED BY ANY FEDERAL OR STATE COURTS.

3. THAT A HEARING IS REQUIRED IN ORDER TO DETERMINE WHETHER OR NOT SUCH STATEMENTS WERE TAKEN IN THE ESSENCE OF DEFENSE COUNSEL; WHETHER OR NOT IT WAS MADE BEFORE OR AFTER THE DEFENDANTS ARRAIGNMENT AND WHETHER OR NOT THE GIVING OF ANY SUCH STATEMENT WAS PROCEEDED BY THE MOTION HEREIN.

4. THE HEARING HEREIN IS ALSO REQUIRED IN ORDER TO DETERMINE WHETHER OR NOT ANY LEADS OR FURTHER INFORMATION WAS ACQUIRED AS A RESULT OF THE TAKING OF THE TESTIMONY FROM THE DEFENDANT.

5. IF ANY STATEMENT WAS TAKEN IN VIOLATION OF THE DEFENDANT'S PRIVILEGES AGAINST SELF INCRIMINATION DEFENSE COUNSEL WILL ASK THAT THE SAME BE SUPPRESSED AT THE CONCLUSION OF SUCH HEARING.

E

GRAND JURY PROCEEDINGS

1. DEFENSE IN THE COUNSEL HEREIN HAS INDICATED THAT THERE WILL BE REQUIRED OF THE PEOPLE OF THE STATE OF NEW YORK THAT THEY DISCLOSE WHETHER THE PROCEEDINGS BEFORE THE GRAND JURY WAS STENOGRAPHICALLY TRANSCRIBED AND WHETHER THE PEOPLE'S CASE WAS PRESENTED TO THE GRAND JURY TO A PARTICULAR GOVERNMENTAL AGENT IN THE FORM OF ALL WITNESS WHO SUMMARIZED ALL OF THE EVIDENCE.

2. IN THE EVENT THAT ANY OF THE EVIDENCE WAS SUMMARIZED BEFORE THE GRAND JURY BY A GOVERNMENTAL AGENT OR INFORMER OR OTHER GOVERNMENTAL WITNESS AND THUS IS REALLY HERESAY, IT IS URGED THAT THE INDICTMENT IS INSUFFICIENT AS A MATTER OF LAW AND MUST BE DISMISSED. IN THE ALTERNATIVE, A HEARING SHOULD BE CONDUCTED TO DETERMINE WHY THE EVIDENCE WAS SUMMARIZED BEFORE SUCH GRAND JURY AND WHETHER THE JURORS WERE ADVISED OF THE FACT THAT THEY WERE RECEIVING ONLY HERESAY EVIDENCE.

3. IT IS RESPECTFULLY SUBMITTED THAT AN INSPECTION UNDER THE GRAND JURY SHOULD BE HELD IN ORDER TO DETERMINE WHETHER OR NOT THE GRAND JURY WAS AWARE OF THE FACT THAT EACH OF THE DEFENDANTS IS ALLEGEDLY CONNECTED IN A BUSINESS WHICH IS PROMOTED UPON BY THE OFFICIALS OF THE DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK AND THE GOVERNMENT OF THE STATE OF NEW YORK, AND WHETHER SUCH PARTICULAR BUSINESS IN

WHICH WERE DISCLOSED TO THE JURY AND WHETHER THEREBY THE GRAND JURY WAS PREJUDICED BY LISTENING TO FACTS WHICH HAD NOTHING WHATEVER TO DO WITH THE FACTS SURROUNDING THE INDICTMENT HEREIN.

4. SET FORTH OF EACH AND EVERY TAPE TAKEN BY THE SAID NEW YORK CITY POLICE OFFICERS WERE READ TO THE JURY AND WHETHER THE GRAND JURY HEARD ANY RESPONSES FROM ANY OF THE DEFENDANTS. IF SO, IT IS RESPECTFULLY SUBMITTED THAT THE SAME SHOULD BE SAID OUT IN THE GRAND JURY MINUTES IN GREAT DETAIL AND IF IT IS, WE RESPECTFULLY CALL THE COURT'S ATTENTION TO THE FACT THAT THE POLICE OFFICER OR OFFICERS HAVE FREQUENTED THE PREMISES AND HAVE FREQUENTLY EATEN THEREAT.

E.

GOVERNMENT INFORMER

1. THE DEFENDANT REQUEST THE GOVERNMENT TO DISCLOSE WHETHER ANY INFORMER AGAINST THE DEFENDANTS OR ANY OF THEM ALLEGEDLY EMPLOYED BY ANY OF THE DEFENDANTS SUPPLIED EVIDENCE TO THE AUTHORITIES EITHER BEFORE, DURING THE COURSE OF OR AFTER THE ALLEGED CRIME ALLEGED IN THE INDICTMENT SO THAT THE DEFENDANTS MAY PROBABLY MOVE TO SUPPRESS THAT EVIDENCE ON THE GROUNDS THAT THE SAME WAS ILLEGALLY OBTAINED.

2. DEFENDANT DEMANDS TO KNOW WHETHER THERE WERE OTHER GOVERNMENT INFORMERS WHO WORKED FOR THEM AND WITH THEM WHO WILL TESTIFY CONCERNING THE ALLEGED TERMS.

3. IT IS URGED THAT UNDER THE DECISION LAW OF THE UNITED STATES OF THE SUPREME COURT, DEFENDANT IS ENTITLED TO HAVE THE GOVERNMENT DISCLOSE WHETHER ANY EMPLOYEE, SPECIAL EMPLOYEE OF AN INFORMER PAID OR UNPAID, WAS, AT THE DIRECTION OF ANY FEDERAL LAW ENFORCEMENT AGENCY OR STATE AGENCY USE OR INSTRUCTED TOGETHER EVIDENCE OR INFORMATION AND OR TO PARTICIPATE IN ANY WAY IN THE ACTIVITIES FOR WHICH FORM THE BASIS OF THE INDICTMENT. IF SUCH INFORMATION WAS REQUIRED THROUGH ANY STATE AGENCY OR ANY OTHER BUREAUCRATIC AGENCY, DEFENDANT

4. IN THE EVENT THAT THERE WAS SUCH INFILTRATION BY AN OFFICIALLY DIRECTED AGENT OR INFORMER THAT WAS EMPLOYED, THE DEFENDANT BELIEVES THAT THE USE OF

THE INFORMATION OBTAINED BY ANY SUCH GOVERNMENT EMPLOYEE OR ANY INFORMATION DERIVED DIRECTLY OR INDIRECTLY FROM HIM IS IN VIOLATION OF DEFENDANTS RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS UNITED STATES CONSTITUTION IS HERETOFORE SET FORTH, A HEARING IS RESPECTFULLY REQUESTED AND AUTHORIZED TO FULLY EXPLORE THESE VIOLATIONS OF DEFENDANT'S CONSTITUTIONAL RIGHTS,

5. DEFENDANT REQUEST THE THAT THE PEOPLE IF SUPPOSEDLY EXPECT TO MAKE USE OF ANY TESTIMONY FROM ANY CO-DEFENDANTS IN ANY RELATED ACTION AGAINST DEFENDANT HEREIN.

G.

INSUFFICIENCY OF INDICTMENT

1. THE INDICTMENT IS INSUFFICIENT ON ITS FACE AND THAT IT FAILS TO DISCLOSE THE MANNER IN WHICH THE DEFENDANT IS ACCUSED OF ALLEGEDLY CAUSING THE CRIME OF ARSEN IN THE SECOND DEGREE ON JULY 25, 1972 AND EXACTLY WHAT OVERT ACTS ARE ALLEGED TO HAVE BEEN COMMITTED BY THE DEFENDANTS AT THE TIME OF THE ARREST.

2. THE INDICTMENT FAILS TO INDICATE THE NATURE OF THE OVERT ACTS COMMITTED BY DEFENDANT.

H.

OTHER RELIEF

THE DEFENDANT MOVES FOR SUCH OTHER FURTHER AND DIFFERENT RELIEF AS THIS COURT MAY SEEM JUST AND PROPER IN ALL OF THE PREMISES.

IT IS ESSENTIAL THAT THE GOVERNMENT ACT QUICKLY UPON THIS MOTION SINCE TRIAL OF THIS ACTION HAS BEEN SET FOR SEPTEMBER 12, 1973 AND A GREAT DEAL OF PREPARATION HAS YET TO BE DONE FOR THE TRIAL OF THIS ACTION.

DATED: NEW YORK, N.Y.
JULY 1, 1973

YOURS ETC.

KASSNER & LETSKY
ATTORNEYS FOR DEFENDANT
OFFICE & P.O. ADDRESS
122 E. 42ND STREET
NEW YORK, N.Y. 10017
TELE: 641-3130

44

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

-against-

GEORGE KAPLAN, JERRY GOMBERG & MARTIN HODAS,

Defendants.

AFFIDAVIT

Indictment No.
3653-1973

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

SEYMOUR S. DETSKY, being duly sworn, deposes and says:

I am a member of the law firm of Kassner & Detsky, attorneys for the defendants named in the above captioned proceedings. I am familiar with the facts herein.

Each of the defendants is charged with the crime of arson in the second degree allegedly committed as follows: that the defendants on or about July 25th 1972 intentionally damaged a building owned by a third party by starting a fire therein, persons who were not participants in the crime being present in the said building at said time, a fact claimed to have been known to the said defendants and the circumstances being such as to render the presence of such persons therein a reasonable possibility. There is also a second count of criminal mischief in the fourth degree and the defendants are further charged in a third count with the crime of arson in the second degree in that on May 10th 1972 they intentionally damaged another building by fire in which the parties allegedly resided to their knowledge and finally a fourth count of criminal mischief in the fourth degree.

I submit that it is of great significance that the first

occurrence of an arson is alleged to have occurred May 10th 1972 and the second act occurred allegedly on July 25th 1972. Thus more than one year has elapsed since the commission of the alleged crime. Nevertheless when the defendants were indicted and arrested, the New York City press was present in the Elizabeth Street police station and statements were made to the press by representatives of the District Attorney's office.

The case received wide publicity.

Each of the defendants has vociferously denied his guilt and each has emphatically claimed his innocence.

It is the opinion of defendants that they are being proceeded against because they have been targets of investigations by various city agencies for conducting peep shows or massage parlors operation and have been viewed as sordid characters by law enforcement agencies. Nevertheless the defendants claim that they have never engaged in any arson nor have they encouraged anyone else to engage in such activities.

It is significant that one year has elapsed since the commission of the alleged crimes. During that period of time there have been many persons who have been questioned grilled and almost threatened with some dire consequences if they did not tell what they knew about the alleged involvement of the defendants in the heinous crimes alleged. The defendants feel that their lines have been tapped. All of their phone conversations have been exposed to the office of the District Attorney or to police officials that have been investigating them.

The District Attorney's office has amassed a wide array of

information concerning the said defendants since they have had such a long period of time in which to operate against the defendants or to interrogate people about the defendants.

It stands to reason that the District Attorney's office have in their possession statements either exonerating the defendants or implicating the defendants. They have information in their files tending to indicate that at least one of the defendants had nothing whatever to do with any of the acts alleged in the indictment. They must have statements I surmise at least by other third parties.

It is reasonable to surmise that there have been tapes made of each and every conversation held between the defendants and between the defendants and third parties and even between the defendants and their respective attorneys. These are tapes that should be immediately revealed and disclosed by the people to the attorneys for the defendants and an opportunity should be made immediately to let the attorneys hear those tapes and obtain transcripts of all of those tapes. There can be no question any more in this court but that the attorneys for defendants are entitled to hear and obtain the tapes about and of the defendants that the defendants have made either consciously knowingly or unknowingly. And we are entitled to know exactly what transpired and the information now in possession of District Attorney as a result of those taped conversations.

We are entitled to know exactly the involvement of defendants

in these transactions in what way they became involved what dates they are alleged to have been present at the premises when the fires occurred and where they were when they were not present at the premises. I'd like to know just what was the connection between the defendants and the fire and in what way the District Attorney purports to connect them to the fire

It can be argued that this is information that belongs solely to the District Attorney's office and is not something that he should yield to an attorney for one or all of the defendants. However I submit to this court that Judge Leff in a now famous case of People v. Wright has held that a criminal case is not a baseball game. We are not struggling for position we are actually concerned with whether a man is innocent or guilty with whether a man should face a prison term or not face a prison term and in essence we are in the same battle for law and order. I cannot condone a criminal being loose on the streets anymore than the District Attorney can. However every defendant who is accused of a crime and who has not committed the crime in the eyesight of any party and who proclaims his innocence, is entitled as a matter of law to a trial at which the facts against him can be presented and at which he can rebut them if he has rebuttal information.

I therefore feel that we are entitled to recover from the District Attorney as requested in demand for Bill of Particulars all requests made for tapes all tapes taken and that we be permitted to hear the same and make transcripts of the same as quickly as possible.

The freedom of each of these defendants hangs by a thread. The thread is literally true. The cases in which these defendants

are involved have been widely publicized. Newspaper readers now look upon the names of these defendants as household words. Mr. Hodas' name is mentioned so frequently in the newspapers, that his name has almost become consonant with evil.

Under these circumstances it behooves this court and it behooves everyone concerned with the basic elements of justice that the District Attorney make available to the attorneys for each of these defendants herein every shred of helpful evidence in this matter.

Judge Cardozo has said that no matter how allegedly evil the man he is still entitled to a fair and just trial in our courts.

If we are going to do anything other than give a man a fair trial, we might as well surrender the thoughts that we still have democratic freedoms in this country.

It is important that the District Attorney make available to us and to the defendants, all tapes that they have of all conversations that they have recorded of the said defendants; that the District Attorney furnish transcript of each and every conversation they have overheard on which they have had eavesdropping devices and whether these have been taken with the aid of warrants or even without warrants.

We are entitled to know each and every statement that the District Attorney has that tends to exonerate these defendants. We are entitled to know just what witnesses have been examined and re-examined and re-interrogated by the District Attorney and what if anything they have said that is good about these defendants.

Each and every item that has been requested herein is important and central to the defense of each of the defendants herein.

Moreover it is important that we obtain this information as rapidly as possible so that we may ascertain whether indeed there may even be a conflict in our representation of three defendants.

At the present time we do not see a conflict. However it may well develop as a result of our obtaining the Bill of Particulars demanded herein that a conflict may develop and we may well be compelled to have either all or any one of the defendants hire other counsel. We cannot judge that until we obtain the particulars from the District Attorney's office.

The case is now marked for trial for September 12th 1973. Time is therefore of the essence in obtaining the particulars requested herein. We ask this court to forthwith issue an order directing the District Attorney to hand over the particulars requested herein at the earliest possible date.

We submit that under People v Wright decided by Mr. Justice Leff that there is no reason for the District Attorney to withhold or conceal any information from the defendants herein. We expect the District Attorney's office to be open and above board in giving us the information we seek.

That no previous application has been made for the relief herein requested.

WHEREFORE we respectfully pray the court make an issue on order herein directing the District Attorney to forthwith

deliver to the defendants and their attorneys the Bill of Particulars requested herein and to grant us such other further and different relief as to this court may seem just and proper in the premises

Sworn To Before Me This
20 day of July 1973.

[Signature]

[Signature]
Seymour S Datsky

SANDRA FIDSON
NOTARY PUBLIC, State of New York
No. 1234567
Qualified in New York County
Commission Expires March 30, 1974

RESPONDENT'S EXHIBIT

(4)

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 30

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.
3553/73

GEORGE FAPLAN,
SERAFY SCHEWITZ and
MARLIN HODAS,

Defendants.
-----X

POSTEL, J.:

The defendants' omnibus motion is decided as follows:

That part of the motion which seeks a discovery and inspection is decided as follows:

Items 11 and 12 are granted to the extent of directing the district attorney to provide the defense counsel with a copy of the results of any scientific tests conducted in this matter (CPL § 240.20, subd. 2).

Items 2 and 3 are granted to the extent of directing the district attorney to provide the defense counsel with a copy of any written or recorded statements made by the defendant to any law enforcement official (CPL § 240.20, subd. 1(b)).

Item 14 is decided hereafter under the heading "Brady Material".

All other items are denied as either the district attorney states that no such evidence is in his possession or as not being the subject of a discovery and inspection (CPL § 240.10 and § 240.20).

That part of the motion which seeks certain information under the title of "Brady Material" is granted to the extent of directing the district attorney to provide the defense counsel with all exculpatory information in his possession and with the

names and addresses of all witnesses who have exculpatory information in their possession (Brady v. Maryland, 373 U.S. 83).

The defendants' demand for a bill of particulars is denied in its entirety. The information sought is not the subject of a bill of particulars (CPL § 200.90, subd. 3).

That part of the motion which seeks a hearing to suppress statements allegedly made by the defendants is respectfully referred to the trial court.

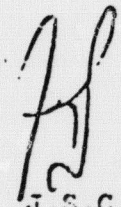
That part of the motion which seeks a hearing to determine whether the evidence before the grand jury was proper is denied. The proceedings of the grand jury unless shown to be otherwise are considered regular upon its face.

That part of the motion which seeks the names and addresses of people alleged to be government informers in this matter is denied. The information sought is not the subject of a pre-trial motion.

That part of the motion which seeks an order to inspect the grand jury minutes or in the alternative for a dismissal of the indictment is denied. The moving papers are barren of any facts to support the defendants' allegation that the indictment is based on illegal or insufficient evidence. All information granted herein must be provided defense counsel within 30 days from the date of this order.

The clerk of the court is directed to forward a copy of this decision and order to the attorney for the defendants.

Dated: September 2, 1973


J.S.C.

NOTICE OF MOTION DATED OCTOBER 5, 1973

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART III
-----X

PEOPLE OF THE STATE OF NEW YORK,

PLAINTIFF

- AGAINST -

GEORGE KAPLAN, JERRY GOMBERG AND
MARTIN HODAS,

NOTICE OF MOTION

INDICTMENT No. 3653/
1973

DEFENDANTS
-----X

S I R S :

PLEASE TAKE NOTICE, THAT UPON THE ANNEXED AFFIDAVIT OF SEYMOUR
S. DETSKY, DULY SWORN TO THE ¹⁰ DAY OF ^{October} ~~SEPTEMBER~~, 1973, AND UPON A TRUE
COPY OF THE INDICTMENT ANNEXED HERETO, AND UPON THE DECISION OF MR. JUSTICE
POSTEL, RENDERED ON SEPTEMBER 19TH, 1973, AND UPON ALL OF THE PLEADINGS AND
PROCEEDINGS HERETOFORE HAD HEREIN, THE UNDERSIGNED WILL APPLY TO THIS COURT AT
A TRIAL TERM PART 30 THEREOF, APPOINTED TO BE HELD AT THE CRIMINAL COURT
COURTHOUSE, LOCATED AT 100 CENTRE STREET, IN THE BOROUGH OF MANHATTAN, CITY,
COUNTY AND STATE OF NEW YORK, ON THE ¹⁵ DAY OF OCTOBER, 1973 AT 9:30 A.M.
IN THE FORENOON OF THAT DAY OR AS SOON THEREAFTER AS COUNSEL CAN BE HEARD FOR
AN ORDER PERMITTING AND AUTHORIZING AN INSPECTION OF THE GRAND JURY MINUTES RE-
LATING ONLY TO THE DEFENDANT, MARTIN HODAS AND UPON SUCH INSPECTION OF THE GRAND

54

Notice of Motion Dated October 5, 1973

JURY MINUTES PURSUANT TO SECTION 210.30 CPL THAT THIS COURT ENTER AN ORDER DECLARING THAT THE EVIDENCE SUBMITTED TO THE GRAND JURY WAS LEGALLY INSUFFICIENT TO SUPPORT AN INDICTMENT AGAINST THE DEFENDANT, MARTIN HODAS, AND FOR AN ORDER DISMISSING THE SAID INDICTMENT ONLY INsofar AS MARTIN HODAS IS CONCERNED, AND SEVERING THE ACTION HEREIN SO THAT THE ACTION CONTINUES ONLY AGAINST GEORGE KAPLAN AND JERRY GOMBERG OR, IN THE ALTERNATIVE, DIRECTING THAT SEPARATE TRIALS BE ACCORDED TO DEFENDANTS GOMBERG, KAPLAN AND HODAS AND SEVERING THE ACTION FOR THAT PURPOSE AND GRANTING SUCH OTHER, FURTHER AND DIFFERENT RELIEF AS TO THIS COURT MAY SEEM JUST AND PROPER IN THE PREMISES.

DATED: NEW YORK, NEW YORK
~~SEPTEMBER~~ *October* 5, 1973.

TO:

HON. FRANK S. HOGAN
DISTRICT ATTORNEY
NEW YORK COUNTY
155 LEONARD STREET
NEW YORK, NEW YORK

YOURS ETC.

KASSNER & DETSKY
ATTORNEYS FOR DEFENDANTS
OFFICE & P. O. ADDRESS
122 EAST 42ND STREET
NEW YORK, NEW YORK 10017
TELE: (212) 661-8190

13a

**AFFIDAVIT OF SEYMOUR S. DETSKY IN SUPPORT OF FOREGOING
MOTION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART XXX

----- x
PEOPLE OF THE STATE OF NEW YORK

:

Indictment No. 3653-1973

:

- against -

:

AFFIDAVIT

:

GEORGE KAPLAN, JERRY GOMBERG and
MARTIN HODAS,

:

Defendants.

:

----- x
STATE OF NEW YORK)

) SS.:

COUNTY OF NEW YORK)

SEYMOUR S. DETSKY, being duly sworn, deposes and says:

I am a member of the law firm of Kassner & Detsky, attorneys for defendants above-named. I am fully familiar with the facts involved herein.

Defendants were indicted for the alleged crime of arson. Each of the defendants has vigorously denied this charge.

The indictment charges that the defendants on or about July 25, 1972 intentionally damaged a building by starting a fire therein and endangered persons who were not participants in the alleged crime. It is also alleged in a second count that defendants committed criminal mischief in the fourth degree. Defendants are further charged in a third count with the crime of arson in the second degree, allegedly committed on May 10th, 1972. They are also charged in a fourth count with criminal mischief in the fourth degree.

56

Affidavit of Seymour S. Detsky In Support of Foregoing Motion

Deponent acts as attorney for all three defendants. At the present time your deponent submits that he does not concede or recognize that there is any conflict in representing all three defendants at this time. However, the defendant, MARTIN HODAS, has indicated quite clearly and objectively to your deponent that the evidence so far as he is concerned could not possibly embrace any allegation of arson as against him.

Defendant, MARTIN HODAS, could not possibly have had any motivation remotely or otherwise to participate in any such crime.

It is respectfully submitted, that MARTIN HODAS, has been pivotal in every inquiry about alleged crime in the midtown area. His activities have been exaggerated beyond all compare. Newspapermen, when they have nothing else to write about, purport to investigate MARTIN HODAS and to distort and to inflate his alleged whims and vagaries and his alleged participations and activities in the midtown area. Only because our United States Supreme Court has so enlarged immunities for newspapers when they publish distorted items in their papers about men of prominence, has prevented us from instituting libel actions against the press. respectfully submitted that MARTIN HODAS has committed no crimes of any kind.

In the instant case, it is submitted that there is no evidence whatsoever that can link MARTIN HODAS to any alleged criminal activity in connection with the claimed arson of July 25th, 1972 and May 10th, 1972.

**Affidavit of Seymour S. Detsky in Support of Foregoing
Motion**

An inspection, I submit, of the Grand Jury minutes, will disclose that any evidence submitted therein with reference to MARTIN HODAS was sparse, negligible, and wholly insufficient to indict anyone. That the sole reason that MARTIN HODAS was indicted with the defendants KAPLAN and GOMBERG, is because of an alleged association he has had with them over the past years.

I submit that MARTIN HODAS has done nothing, has participated in nothing and has in no way, by conduct or otherwise, implicated himself in any such situation that could possibly deserve the type of indictment he received herein.

I further submit that if the Court inspects the Grand Jury minutes and determines that the evidence is sufficient for the indictment, that there should be a severance of the actions herein, so that Mr. HODAS is not in any way tried together with the defendants KAPLAN and GOMBERG.

We submit that the evidence against KAPLAN and GOMBERG may be such as to prejudice the defendant, MARTIN HODAS. That there is no reason why MARTIN HODAS should be tried together with KAPLAN and GOMBERG in any way whatsoever. The testimony that may be given against KAPLAN or GOMBERG will seriously prejudice HODAS to the extent that he will not receive a fair trial.

Affidavit of Seymour S. Detsky In Support of Foregoing Motion

Moreover, it is respectfully submitted that the testimony of HODAS may be so substantially different than the testimony of KAPLAN and GOMBERG that any testimony he may give may substantially prejudice KAPLAN and GOMBERG.

For this reason, we respectfully submit that the trial of MARTIN HODAS should be severed completely from the trial of KAPLAN and GOMBERG.

We therefore submit that it is the statement and claim of the defendant, MARTIN HODAS, that he is completely innocent of any connection with the crime of arson, either on July 25th, 1972 or on May 10th, 1972 and that he has no knowledge of any arson that took place on those days and that he does not know what took place on those days. That the defendant, MARTIN HODAS, states that he is wrongfully accused and wrongfully included in this indictment.

I submit that while MR. MARTIN HODAS proclaims his innocence herein that this should not be taken by the Court in any way as a reflection on KAPLAN and GOMBERG, both of whom equally proclaim their innocence as well.

I further submit that the evidence submitted to the Grand Jury was legally insufficient to justify an indictment against MARTIN HODAS. But if the Court finds that in its opinion there was sufficiency of evidence, then I submit that in all fairness and justice to all parties concerned that the allegations and indictment against MARTIN HODAS be tried separately from

17a

Affidavit of Seymour S. Detsky In Support of Foregoing Motion

the allegations against KAPLAN and GOMBERG.

That no previous application has been made for the relief herein requested. A motion was made before Mr. Justice Postel for omnibus relief. Among the objects of the relief was an inspection of the Grand Jury minutes. Judge Postel was of the opinion that insufficient facts were stated in the moving papers to justify an inspection of the Grand Jury minutes.

For this reason, the application is being renewed only insofar as MARTIN HODAS is concerned for an inspection of the Grand Jury minutes. If as I have stated in the Court's opinion there is a sufficiency of evidence, then we submit that the next item of relief is the severance of this action. Justice can best be served by severing the action herein on the part of MARTIN HODAS.

WHEREFORE, your deponent respectfully prays that this Court make and enter an order herein granting an inspection of the Grand Jury minutes insofar as the defendant MARTIN HODAS is concerned and that upon such inspection of the Grand Jury minutes that the Court determine that the evidence against MARTIN HODAS was legally insufficient upon which to base any indictment of said defendant and to order a dismissal of said indictment; or, in the alternative, if the Court believes that the indictment rests upon sufficient evidence, that it order a severance of the trial as far as MARTIN HODAS is concerned and order that MARTIN HODAS receive a completely separate

**Affidavit of Seymour S. Detsky In Support of Foregoing
Motion**

trial from the defendants KAPLAN and GOMBERG herein, and that the said defendant MARTIN HODAS receive such other, further and different relief as to this Court may seem just and proper in the premises.

/s/

Seymour S. Detsky

Sworn to before me this 1st
day of ~~October~~ 1973
SANDRA RIPSON
NOTARY PUBLIC, State of New York
No. 31-0593265
Qualified in New York County
Commission Expires March 30 1974

- 4 -

TRANSCRIPT OF PROCEEDING (COLLOQUY) BEFORE RICHARD
G. DENZER, J. DATED DECEMBER 12, 1973

THE SUPREME COURT OF THE STATE OF NEW YORK,

PART 103

NEW YORK COUNTY

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

- against - :

JERRY GOMBERG, :

MARVIN HODAS, :

GEORGE KAPLAN, :

F-394/73

3653/73

Defendants. :

-----X

111 Centre Street
New York, New York
December 12th, 1973

B E F O R E

HON. RICHARD G. DENZER, J. S. C.

A P P E A R A N C E S:

FOR THE PEOPLE:

MICHAEL KAVANAUGH, ESQ., A. D. A.

FOR THE DEFENDANTS:

HERBERT KASSNER, ESQ. AND

SEYMOUR DETSKY, ESQ.

Estelle Aufrichtig

Court Reporter

(A. M. Session)
(Colloquy occurred among the Court and counsel which was recorded, but not transcribed)

THE COURT: Mr. Detsky, I want to speak to the defendants. Mr. Kaplan, Mr. Gomberg and Mr. Hodas: you are all represented by the same counsel, Mr. Detsky.

MR. DETSKY: If Your Honor please, they are represented by the law firm of Kassner and Detsky. My partner, Mr. Herbert Kassner, will be trying the case and selecting the jury.

THE COURT: I take it that you are all satisfied with your counsel, Mr. Kassner, of Mr. Detsky's firm. I want to make certain at this point, that you don't regard your defense as being in conflict or that there might be a conflict of interest with respect to any attorney that represents all three of you. Do you wish to have Mr. Kassner represent you, Mr. Hodas?

MR. HODAS: Yes.

MR. GOMBERG: Can I talk to my lawyer?

THE COURT: Sure.

MR. DETSKY: Mr. Gomberg has told me he doesn't know what Your Honor means by what he just said.

THE COURT: I just want to make certain that in your mind, there is no reason that one attorney should represent all three of you; that the attorney won't be put in a position of having to take a course of action which is favorable to one, but not to another. I just want to make sure you don't feel that way. Apparently

you don't if you retained the same attorney; do you understand?

MR. GOMBERG: I understand that, but I was thinking, maybe it is better for us to get another lawyer. To have three of us--

THE COURT: Is there any conflict that you can think of between you and any of the other defendants?

MR. GOMBERG: I think maybe another lawyer might be helpful to us.

THE COURT: In addition to Mr. Kassner?

MR. GOMBERG: Yes.

THE COURT: You don't want to be represented by Mr. Kassner?

MR. GOMBERG: I would like to talk it over with another lawyer.

THE COURT: Yes, Mr.--

MR. KAVANAUGH: Judge, this matter has been pending since July of this year. The matter was first marked "ready" by, I believe, both sides; Mr. Detsky can correct me if I am wrong, sometime late in September and early October, and then the matter of the tapes came up and it was delayed. Not once during that entire time has Mr. Gomberg, Mr. Kaplan or Mr. Hodas or the firm of Kassner and Detsky ever indicated to anyone that they thought there was a possibility of a conflict. Now that we are about to commence with the trial in this case, and this Court

has strenuously and I think quite correctly, told defense counsel that it will proceed and the Court will make certain sacrifices to proceed to trial, Mr. Detsky has indicated quite clearly he does not want to start the trial today and wants adjournment until January; not until that is done does one of the defendants stand up pursuant to Your Honor's questioning.

THE COURT: Did anybody ever indicate that there might be a conflict and ask for another attorney?

MR. DETSKY: No, but with all due respect to Mr. Kavanaugh, I did make a motion returnable before Judge Sutton, I believe, in which I asked for severance of the case on the ground that I felt there might be a conflict. Such motion was denied. I pointed out to the Court that I did not know what the grand jury minutes held or said. I asked for an inspection of those grand jury minutes only as related to Marvin Hodas, only because I felt I did not want to be in a position where there might be a conflict. The Court denied that motion because I did not present facts that would indicate a conflict. I cannot present facts that would indicate a conflict because I don't know what those facts are. There is a motion on file. I don't want Mr. Kavanaugh to feel that I never raised that ques-

tion.

THE COURT: At that time or any other time, did you ever suggest to any of the defendants that they retain another attorney because of any conflict?

MR. DETSKY: Four or five days ago, I suggested to Mr. Hodas that there might be a conflict and either another or the other two should get themselves another lawyer. Mr. Hodas, Mr. Kaplan and Mr. Gomberg said they had confidence in our firm to handle it. But I do want this Court to understand that it was discussed in our office and I felt one of the three should get another counselor.

THE COURT: The way the situation stands is that you advised them of this and they told you they didn't want to hire other counsel?

MR. DETSKY: That's correct.

THE COURT: And now, as the District Attorney has pointed out, for the first time, one of the defendants says that maybe--

MR. DETSKY: I don't want Your Honor to think this is new. Mr. Kavanaugh says I never raised it. It has been bothering--

MR. KAVANAUGH: May I read a motion paper affidavit filed by Mr. Detsky? I read: "Deponent acts as attorney for all three defendants. At the present time your deponent submits that he does not concede or recognize that there is any conflict in

representing all three defendants at this time. However, the defendant Marvin Hodas indicated clearly and objectively that the evidence so far as he is concerned, cannot properly embrace any allegation of arson against him." That is an allegation that an officer of the Court has cited. I submit that this application for another attorney, this application is made solely to delay the trial in this matter.

MR. DETSKY: I will show you that, Your Honor, I am not asking for an attorney, nor am I saying there should be another attorney. If Your Honor asks me, I would say this--I would say I didn't know that Mr. Gomberg was going to make such a request. On page three of the affidavit from which Mr. Kavanaugh was reading: "I further submit that the Court inspects the grand jury minutes and determine that the evidence is such for the indictment; that there should be a severance of the action so that Mr. Hodas is not in any way tried together with the defendants Kaplan and Gomberg. We submit that the evidence against Kaplan and Gomberg may be such as to prejudice the defendant Hodas. There is no reason why Hodas should be tried together with Kaplan and Gomberg whatsoever. The testimony against Kaplan and Gomberg may prejudice Hodas to the extent that he may not receive a fair trial." I don't want Your Honor to think it has not bothered me.

MR. KAVANAUGH: Can I ask the Court a question? Could the Court inquire as to whether on this application, Mr. Detsky, as a member of the Bar of the State of New York, wanted to represent Mr. Kaplan and Mr. Gomberg in one trial and represent Mr. Hodas on another trial and the basis of the severance would be that there would be a probable conflict of interest? If that question is directed to Mr. Detsky, we can find out what is going on. If he makes those answers in the affirmative, there is a real question as to whether his conduct has been proper and probably, the matter should be referred to the Bar Association.

THE COURT: I think I am going to cut this discussion short. We will proceed with the trial. If any of the defendants wish, either today or any other day, to bring in other counsel in the case, they are at liberty to do so. If any defendant feels at some point that there is a conflict of that nature, he may have other counsel.

MR. KAVANAUGH: Would you ask Mr. Detsky if he feels there is a conflict? I would like to know now so it is clear on the record.

THE COURT: Do you feel that there is a conflict, Mr. Detsky?

MR. DETSKY: If Your Honor please, right now, I don't feel there is one and I have said that in

my affidavit. However, my concern is, and I have manifested this concern in the motion that I made or I wouldn't have made that motion, that I wanted to be really sure. No attorney can be sure when he is representing three defendants. There may be a conflict. The United States Circuit Court of Appeals in the New York Law Journal said that the lawyer wasn't aware that there was a conflict until one of the defendants blurted out something during the course of the trial.

THE COURT: I will repeat what I said. If it happens that any of the defendants think that another attorney should be brought in, you are at liberty to do so. I think that no other counsel are probably familiar with this case. I don't intend to have any adjournment here, any abatement of the trial for that purpose. You are aware of it now and you can be thinking of the matter and if something does arise, I will be happy to have other counsel enter the case in the course of the trial.

MR. DETSKY: I will just say one thing: it might be wise to adjourn to your chambers and discuss this with Mr. Kavanaugh privately. If, in his opinion, there may be a conflict, he shall enlighten the Court. I can make an intelligent--

MR. KAVANAUGH: In my opinion, there is no conflict

of interest.

THE COURT: Let's call the panel in.

MR. DETSKY: If Your Honor please, I ask for an adjournment often minutes. My partner is on his way down. By a ten minute adjournment, we can't lose anything.

THE COURT: By the time they are sworn--

MR. DETSKY: What can we lose?

(A discussion takes place off the record at side bar.)
(Voir Dire occurs which was recorded but not transcribed.)

* * * * *

CERTIFIED TO BE A TRUE AND ACCURATE EXCERPT OF THE
STENOGRAPHIC MINUTES OF THE PROCEEDINGS.

Estelle Aufrechtig
Estelle Aufrechtig

People-Hatton-direct

138

(Whereupon, side-bar conference was concluded).

THE COURT: Call your next witness, please.

MR. KAVANAUGH: Christopher Hatton.

C H R I S T O P H E R H A T T O N, called as
a witness on behalf of the People, was duly
sworn by the Clerk of the Court, was examined
and testified as follows:

THE CLERK: State your full name and
spell your last name.

THE WITNESS: Christopher James Hatton,
H-a-t-t-o-n .

THE CLERK: Your address?

THE COURT: Where did you stay last night?

MR. KAVANAUGH: Judge, the witness stayed
in a hotel. I would just as soon not disclose
where though.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. KAVANAUGH:

Q Mr. Hatton, how long have you resided
here in New York City?

A About eight years.

* * * * *

71

A No, sir.

Q Do you recall telling him that if he didn't give you the \$100, you would say everything the DA wanted you to say at this trial?

A No, sir, I don't recall that. No, sir.

Q Are you saying you didn't say it or are you saying you don't recall it?

A I didn't say that. I don't believe I said that, no.

Q You don't believe you said that?

A I was drunk and I x can't remember it.

Q It's possible you said that but you can't remember?

THE COURT: He has answered the question, Mr. Kasner.

Q Did Mr. Hodas turn you down for your request of the \$100?

MR. KAVANUGH: Objection-- withdrawn, your Honor-- no, excuse me. I'm sorry. The witness said he doesn't recall asking him for \$100.

THE COURT: I will sustain the objection.

Q Who owns the Geisha House?

Handwritten mark

A I don't know who really owns it. I know I think who owns it.

Q You don't really know who owns it?

A I think it's--

Q I asked you whether you know who owns the Geisha House.

A I know who runs it.

Q Who runs the Geisha House?

A Mr. Kaplan, Mr. Gomberg and Mr. Hodas.

Q Mr. Hodas runs it?

A He's there. I know he's partners. I believe he's partners with Mr. Kaplan and Mr. Gomberg. I'm not sure.

Q Do you know he's a partner?

A No, sir, I don't.

Q What makes you believe he's a partner?

MR. KAVANUGH: Objection.

THE COURT: Sustained.

Q Mr. Hatton, when you were asked on direct examination who owns the Geisha House, you said, "I believe Mr. Hodas owns it." Did you say that?

A Yes, sir.

Q Do you know who owns it?

MR. KAVANAUGH: Objection. That is not inconsistent with anything the witness has said. I object. It's the same question he asked before which the Court sustained my objection.

THE COURT: Sustained.

MR. KASNER: Exception, your Honor.

Q Are there other people that come to the Geisha House besides Mr. Hodas?

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

Q Did Mr. Hodas ever pay your salary at the Geisha House?

A No, sir.

Q Did he ever pay the salary of anybody else at the Geisha House, to the best of your knowledge?

A I don't know.

Q Did you ever know him to pay anybody's salary?

MR. KAVANAUGH: Objection.

THE COURT: Sustained. Will you approach the bench, Mr. Kasner?

74

(Whereupon, a side-bar conference was held out of the hearing of the jury as follows:)

MR. KAVANAUGH: What are we getting at now?

MR. KASNER: This is his direct testimony.

THE COURT: So?

MR. KASNER: He made a statement that Mr. Hodas owns the Geisha House. Now they are trying to add some responsibility for fires of his owning the Geisha House. He doesn't own the Geisha House. ~~This~~

THE COURT: This is very collateral. I don't see what it has to do with the charge here. What difference does it make who owns the Geisha House?

MR. KASNER: If it was proper on direct examination, I don't see why it's not proper on cross-examination.

THE COURT: This is purely collateral. I see no relevancy to it.

(Whereupon, side-bar conference was concluded).

75

CROSS-EXAMINATION (continuing):

BY MR. KASNER:

Q How often did you see Mr. Hodas at the Geisha House during the period from April to September 1972?

MR. KAVANAUGH: Objection.

THE COURT: Overruled.

A I'm not sure of the amount of times.

Q Every day? Once a week? Once a month?
How often did you see him?

A I really can't recall.

Q Did you see him every day?

A No, sir, he wasn't there every day.

Q Did you see him, at least, once a week?

A Sometimes it would be-- it would be different times. It wouldn't be like once a week. Sometimes, he would be there maybe three or four times a week and he wouldn't be there for two weeks. It was like that. It wasn't a regular thing.

Q So, Mr. Hodas didn't regularly come to the Geisha House; is that correct?

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

76

Q Did you state on direct examination that you overheard all three defendants discussing the problem of price cutting by the Palace and, as a result, you broke the windows of the Palace?

MR. KAVANAUGH: Your Honor, we have a record of direct examination. I will object to the form of the question.

THE COURT: The objection is sustained.

Please don't ask questions in the form of whether the witness did testify. The record will show that.

Q Why did you break the windows of the Palace?

MR. KAVANAUGH: Objection.

THE COURT: Overruled.

A Because Mr. Hodas and Mr. Kaplan and Mr. Gomberg, they expressed dissatisfaction about the price, the cutting.

Q Now, if Mr. Gomberg, Mr. Hodas and Mr. Kaplan had expressed dissatisfaction with the bank on the corner being in business, you would have broken their windows?

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

Q Who employed Morton and Jones?

A The Geisha House.

Q Who are their bosses?

A Mr. Hodas, Mr. Kaplan, Mr. Gomberg, to the best of my knowledge.

Q On what do you base the statement that Mr. Hodas was their employer?

MR. KAVANAUGH: Objection-- withdrawn,
your Honor.

A Well, I know he had the machines there and he had a lot to say about what went on there.

Q He had the peat machines there?

A Yes, sir. Nobody really officially said he was one of the bosses. I just assumed he was one of the bosses.

Q Did Mr. Hodas hire Morton and Jones?

MR. KAVANAUGH: Objection.

THE COURT: Overruled.

MR. KAVANAUGH: Hired them for what, your Honor? To work or to set the fires?

THE COURT: At what time.

Q Did he hire them for the work at the Geisha

78

House?

A I don't really know who hired them at all, to tell you the truth.

Q Did he hire you?

A Mr. Hodas? No, sir.

Q Do you know of any employee, of your own knowledge, at the Geisha House who was hired by Mr. Hodas?

A No, sir.

MR.KAVANAUGH: Objection.

THE COURT: Sustained.

Will you approach the bench?

(Whereupon, a side-bar conference was held out of the hearing of the jury as follows):

THE COURT: I am going to remind you again that the purpose of this particular phase of cross-examination, the idea, as it has been agreed, is that you are to use this time to cross-examine on the basis of possible contradictory statements in the material ~~in~~ which was given to you and which you have been preparing over the weekend. You are not doing that. You are going off into other phases and I am not going to allow any more of it. Whatever you have in the way of inconsistent statements and occurrences in the

79

District Attorney's Office or anywhere else, I will allow you to interrogate on. But, if you don't direct your cross-examination to that now, then I am going to assume it's concluded.

MR. KASNER: If your Honor please, I must lay a basis for an inconsistent statement. I have just laid the basis for an inconsistent statement. If your Honor wants to tie my hands on cross-examination, there's nothing I can do about it.

THE COURT: I don't know what you mean.

MR. KASNER: I will not have my hands tied and I will not allow your Honor to restrict my cross-examination to expedite the trial.

THE COURT: All you are doing now is asking a lot of questions on collateral material and, apparently, trying to ambush the witness by pointing out an inconsistent statement. We are dealing with the direct examination of the witness and I told you you have a right to attempt to bring out any inconsistent statements he made on material matters on his direct

examination. But, I'm not going to allow you to--

MR. KASNER: I can't do that without laying the foundation. I'm laying a foundation for inconsistent statements.

THE COURT: You can do it without laying any foundation. You have direct testimony and you have the other material. Now, you can ask him whether or not he made certain statements at such and such a hearing or proceeding or occurrence.

MR. KASNER: Your Honor has told me I can't ask him whether he made a certain statement on direct examination. I think your Honor was wrong in stating that I can't ask him that question.

THE COURT: If you are going to follow that immediately with a question about a possible contradictory statement, I will allow it within limits.

MR. KASNER: I intend to do just that.

MR. KAVANAUGH: May I be heard on that?

If counsel is going to specifically refer to something on direct examination-- we have the record-- I would like him to refer to a page number

and a specific question.

THE COURT: I will allow you to do it this way to a certain extent: First, ask the witness whether he made such and such a statement during the incident in question and, if he answers "yes," then you may bring out, "Did you testify to that at the trial here on direct examination?" You can do it in that way. I am not going to allow you to go all over the lot.

MR. KASNER: I am not going all over the lot, your Honor.

THE COURT: Please follow my direction.

(Whereupon, side-bar conference was concluded).

CROSS-EXAMINATION (continuing):

BY MR. KASNER:

Q On direct examination, you referred to a conversation in April 1972 with the defendants; is that correct?

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

Q Who was present at the conversation you

testified to on direct examination between yourself and the defendants in April of 1972.

A Would you repeat that question, please?

MR. KASNER: Would you read back the question?

(Whereupon, the Reporter read the question).

A I believe it was Mr. Hodas, Mr. Bomberg and Mr. Kaplan.

Q And yourself?

A Yes, sir, I was there.

Q And, only four people were at that conversation; correct?

A There might have been Mr. Morton. I'm not sure if he heard anything or not.

Q Where was this conversation?

A In the Geisha House.

Q Where was Mr. Morton?

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

Q Was he there or wasn't he there?

MR. KAVANAUGH: Objection.

THE COURT: Sustained. The witness says he does not remember. He might have been

83

the defendants concerning price fixing?

THE WITNESS: I know I told the fire marshals. I'm not sure that I told the DA.

THE COURT: That's the answer.

Q When did you tell the fire marshal?

A When I was first picked up at 109 West 42nd Street and they took me down to, I think it was Church Street-- 110 Church Street for questioning.

Q On April 19, 1973, as to these conversations I have just asked you about when you asked the following question and did you give the following answer?

"Question. Who was the discussion between?

"Answer. George, Jerry and, I remember, Marty was there because Marty made a comment like, 'You guys are letting him get away with it because there's no skin off my nose.'"

Do you recall making that statement?

A I recall something to that effect. I can't recall ~~these~~ it word for word. I mean, exactly what was said because there's a confusion about the dates and it's mixing me up a little bit. One time it's 1972; the next time it's 1973.

84

Q ~~Now~~ We're talking about April 19, 1973, your interview in Mr. Jacobs' office, the DA's Office in New York County. That's what we're talking about. Are you confused?

MR. KAVANAUGH: First of all, I would object to counsel's characterization of this witness' present state of mind. I would also like to know why counsel is asking the question. If it's evidence of an inconsistent statement, I have no objection.

THE COURT: Would you get to any inconsistent statement, if you have a question about it, Mr. Kasner.

MR. KASNER: I'm asking whether he made that statement and whether he recalls that question and answer.

MR. KAVANAUGH: Objection.

THE COURT: Overruled.

Do you recall it or don't you?

THE WITNESS: No, sir, not word for word, I don't know, but something to that effect.

THE COURT: That's the answer, "not word

85

for word,? but something to that effect.

Q What did you understand when you heard the words spoken by Mr. Hodas, "There's no skin off my nose"? What did that mean to you?

MR. KAVANAUGH: Objection.

THE COURT: I will take it. Overruled.

A What does "no skin off my nose" mean to me? It doesn't mean anything to me, I guess.

Q So, the competition which was hurting their business--

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

Next question.

MR. KAVANAUGH: Your Honor, may we approach the side bar? I would like to put something on the record, if I may.

(Whereupon, a side-bar conference was held out of the hearing of the jury as follows):

MR. KAVANAUGH: Judge, there is a very specific legal acceptable way of asking these questions. Counsel, if he wants to ask these questions, if they are evidence of a prior inconsistent statement, he is to ask him, as I

understand the law of evidence, "Do you recall g being asked this question and do you recall giving this answer"? If that question and answer is not consistent with something this witness has already testified to, it is to be stricken from the record and the jury is admonished to ignore it.

Counsel is asking the question, not on the basis it is inconsistent but on some other basis, I gather it.

THE COURT: I thought he was getting at some inconsistency of the witness but I must confess I haven't heard any ~~specific~~ yet.

MR. KASNER: This is an indication to the witness who heard this made by Hodas that Hodas is not a partner and has no interest in the Geisha House.

THE COURT: So what?

MR. KASNER: So what?

THE COURT: What is the significance of that?

MR. KASNER: Then why would he participate

in making a fire? Why would he participate if he has no interest in the place?

THE COURT: Was the Geisha House the only one involved here?

MR. KASNER: Yes, your Honor. What possible interest does he have in making the fire if he has no interest in the place?

THE COURT: In the Geisha House?

MR. KASNER: The Geisha House.

THE COURT: I thought we are talking about the fires in the Palace.

MR. KAVANAUGH: Can you bring the statement over so we can look at it?

MR. KASNER: The feeling of the DA is that these people owned the Geisha House; that the competition in the Palace and in the French was hurting the Geisha House business.

THE COURT: I didn't think it was just the Geisha House.

MR. KASNER: Just the Geisha House.

MR. KAVANAUGH: Could you ask if, possibly, Mr. Kasner can bring the question he just asked the witness? I think it will clearly show that

that counsel is not getting at that and, I think is somewhat misrepresenting or distorting what this witness says. May we take a look at it now, if you have no objection.

MR. KASNER: I started out with "On April 19, 1973, when were telling the DA about a discussion among the defendants, about how the Palace price cutting was ruining business, do you recall that, and I said, were you asked the following question and did you give the following answer?

"Question. Who was the discussion between?

"Answer. George, Jerry and, I remember, Marty was there, because Marty made a comment like, 'You guys are letting him get away with it because there is no skin off my nose.'"

THE COURT: I don't quite see any inconsistency.

MR. KASNER: If he says "no skin off my nose, then the competition hurting the business at the Geisha House doesn't bother him because he has no interest in the Geisha.

THE COURT: You have already asked that

and he answered it.

MR. KASNER: The whole theory and motivation is they wanted to knock out the other places because the competition was hurting the Geisha.

THE COURT: This is something to make on summation.

MR. KASNER: I have to get it in evidence before I make it on summation.

MR. KAVANAUGH: He doesn't remember being asked it. The only way to get it in is to play the recording introduced in evidence.

If you can do that, that is it, as I understand the law.

THE COURT: I am telling you again, you are going to have to confine your questions to alleged questions and answers which were inconsistent with this trial testimony. Just ask him, "On such and such an occasion, were you asked this question and did you make this answer?" Then go on to the next one. I'm not going to allow a lot narrative analysis of the situation that existed at that time. You had all the

THE COURT: You have your motion.

Call the jury in.

(~~Whereupon~~ Whereupon, the jury then entered the courtroom and a jury poll was made.)

COURT CLERK: Trial continued, everyone is present including the entire jury panel at this time and the alternate.

MR. KAVANAUGH: The People call Mr. Dexter Morton, Your Honor.

D E X T E R M O R T O N, a witness having been duly called in behalf of the People's Case, was duly sworn, and ~~he~~ testified as follows:

COURT CLERK: Sir, give us your full name?

THE WITNESS: Dexter Morton.

COURT CLERK: Address?

THE WITNESS: 414 West 42nd Street is where I used to live. I live in the Tombs now.

COURT CLERK: 125 White Street.

MR. KAVANAUGH: Your Honor, I would like to ask an Administrative matter.

Morton - People - Direct

400

THE COURT: Let's go off the record gentlemen.

(Whereupon, there was a discussion had off the record outside the hearing of the jury.)

THE COURT: You may begin with your direct examination, Mr. Kavanaugh.

DIRECT EXAMINATION

BY MR. KAVANAUGH:

Q Mr. Morton, you are residing in the Tombs because you are under arrest, is that correct?

A Yes.

Q When were you arrested?

A August 16, 1972.

Q Now, prior to August 16, 1972, were you a resident of the ~~State~~ City of New York?

A Yes.

Q ~~Where~~ Where were you employed?

A The Geisha House, 414 West 42nd Street.

Q Who were your employers, if you know?

A George Kaplan and Jerry Gomborg.

* * *

92

11

Morton - ~~Real~~ People - Cross

528

recorded within the hearing of the jury.)

Q Would you please tell the jury how often Marty Hodas was in the Geisha House during the months of April through July of 1972?

A I would say about three, four nights out of a week.

Q What was he doing there?

A Playing cards.

Q Did Marty Hodas ~~xxxx~~ hire anybody at the Geisha House?

MR. KAVANAUGH: Objection, Your Honor.

THE COURT: To do what?

MR. KASNER: Any place to work in the Geisha House?

MR. KAVANAUGH: Objection.
If he knows, that is all I ask.

MR. KASNER: If he doesn't know, he can say he doesn't know.

THE COURT: Why don't you ask him whether he knows.

MR. KASNER: I don't have to ask him if he knows. If he doesn't know, he will

12

Morton - People - Cross

529

tell me he doesn't know.

Q Did Mr. Hodas hire anybody at the Geisha House?

A Not to my knowledge.

Q Did he fire anybody at the Geisha House?

A Not that I know of.

Q Did he pay anybody's salary at the Geisha House?

A Not that I know of.

Q As far as you know, the only thing he did at the Geisha House was to play cards, is that right?

A Yes.

Q Were you aware that Mr. Hodas was the landlord of Mr. Gemberg or Mr. Kaplan at the Geisha House?

MR. KAVANAUGH: Objection, Your Honor.

MR. KARNER: I am asking if he was aware of it. That is all I am asking him.

THE COURT: We don't know that he was, do we?

54

AFTER RECESS

THE COURT: Call the jury in, please.

MR. KASSNER: Judge, can I speak in a narrative fashion, when I take the stand? I'm taking the stand first.

THE COURT: Mr. Detsky is not here?

MR. KASSNER: All I'll testify to is the bottle. I shouldn't testify more than one minute.

THE COURT: Is that satisfactory to you?

MR. KAVANAUGH: Sure.

THE COURT: All right, surely.

(Whereupon, the jury then returned to the courtroom.)

THE CLERK: Case on trial continues after short recess. If The defendants are present, their attorney is present, assistant district attorney is present. Entire jury panel is present.

THE COURT: Mr. Kassner?

HERBERT KASSNER, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

THE CLERK: State your full name and spell your last name.

95

Kassner - Defts - direct

THE WITNESS: Herbert S. Kassner,
K-a-s-s-n-e-r, 125 Riverside Drive, New York,
New York.

THE COURT: Mr. Kassner, since your ~~axe~~
co-counsel is not here, you have, as I under-
stand it, requested permission to give your
testimony in narrative form; is that correct?

THE WITNESS: Yes, your Honor.

THE COURT: Please proceed.

THE WITNESS: On the night in question
when fire marshals invaded the premises --

MR. KAVANAUGH: Objection, your Honor.

THE WITNESS: When fire marshals --

MR. KAVANAUGH: Objection.

THE WITNESS: I withdraw the word
"invaded" -- entered the premises of the
Geisha House, 414 West 42nd Street, conducted
a search of the premises, they found a small
white jug, approximately this high, maybe
this wide.

THE COURT: Indicating about six inches
high.

THE WITNESS: Right. Like this, I
don't know if it was square or round. But it

Kassner - Defts - direct

was a plastic jug in back of a counter in the front room, the one nearest the front door of the Geisha House.

They took this jug and they opened it up, and it was filled to the very top, the very top, with some substance.

They took the jug out on the sidewalk and they spilled a little on the sidewalk and lit a match to it, and it did burn.

There was, I don't think, room for a quarter of an ounce of liquid in that jug. It was just filled to the very top, I was present at the time.

I saw it found, I saw it opened, and I saw it spilled on the sidewalk.

I have no further testimony.

THE COURT: All right, do you have any questions, Mr. Kavanaugh?

MR. KAVANAUGH: Yes.

~~CROSS-~~
~~EXAMINATION~~ EXAMINATION

BY MR. KAVANAUGH:

Q Mr. Kassner, you were at the Geisha House when the fire marshals arrived?

A Yes, I was.

Q What were you doing there?

97

A I don't have the vaguest idea. I have clients all along 42nd Street.

MR. KAVANAUGH: Would you ask the witness to be responsive?

THE COURT: I'll sustain an objection to the question. I don't see the relevancy of it.

Q Now, how much are you paid to represent the defendant in this case?

THE COURT: Your objection is sustained.

MR. KAVANAUGH: May we have a side-bar, please? The witness can come, too, if he likes.

(The foregoing side-bar conference out of the hearing of the jury ensued:)

MR. KAVANAUGH: Now, there is a material conflict between what Mr. Kassner says and what Marshal Borchick says, it goes to the question of credibility. I want to bring out his witness to lying.

THE COURT: He is the attorney in the case and everybody knows it. I'm not going to permit you to delve into the details of his retainer and matters like that.

MR. KAVANAUGH: It clearly goes to credibility.

MR. KASSNER: Judge, I'm willing to answer the question.

THE COURT: All right.

(Whereupon, the side-bar conference out of the hearing of the jury then concluded.)

A I have not received one penny of a fee from Jerry Gomberg or George Kaplan. I have not received one penny of a fee towards this case from Martin Hodas. I assume that they will pay me at some time in the future when they can.

Q How much?

A I haven't made a fee, that will be determined by how long this case goes, and many factors in accordance with standards set forth by the minimum fee schedule of the American Bar Association.

Q Well, give us a rough idea, Mr. Kassner. You can do that?

THE COURT: Mr. Kassner, even though you are a witness, I'll allow you, of course, to make objections if you wish.

MR. KASSNER: I have no objection to answering the question.

A I don't know how much I'm going to charge.

XX

Q Well, isn't it a fact, Mr. Kassner, that you have been retained by the three defendants to represent them in other matters?

A Yes, I have.

Q Aside from this case?

A No question about it.

Q How long have you represented the three defendants in other legal matters?

A Not long enough to lie for them.

MR. KAVANAUGH: Your Honor --

Q Are you fencing with me, Mr. Kassner?

THE COURT: The answer is stricken. The jury will disregard it.

A I've represented Mr. Hoda, Mr. Gomberg, and Mr. Kaplan maybe two years.

Q I see.

How much did the defendants pay your firm to represent Dexter Morton and Earl Jones when they were arrested for the crimes charged in this case?

A I have not received one penny of a fee for that representation.

Q Well, were you assigned? Was your firm assigned by the Appellate Division to represent

150

Kassner - Defts - cross

Mr. Morton and Mr. Jones?

A Not that I know of.

Q Was your firm appointed by the Court to represent Mr. Morton and Mr. Jones?

A Not that I know of.

Q How did you come about to represent Mr. Morton and Mr. Jones?

A I was asked to represent them by their employers and then --

Q Who is their employers?

A Jerry Gomberg and George Kaplan.

Q I see.

A And then I was asked by the defendants themselves to represent them.

Q The defendants themselves, you're referring now to Mr. Morton and Mr. Jones?

A Yes, Mr. Morton and Mr. Jones.

Q And did you discuss at any time with Mr. Kaplan and Mr. Gomberg how much your firm would be paid to represent Mr. Morton and Mr. Jones?

A No.

Q Never once did you discuss with Mr. Kaplan and Mr. Gomberg how much they would pay you to represent them?

101

A Never once.

Q Now, do you recall learning at any time during the course of your representation that the district attorney's office had tape recordings within which Mr. Morton and Mr. Jones had implicated Mr. Kaplan and Mr. Gomberg in the commission of these fires?

A Did I learn?

Q Yes.

A Well, the only way I learned it was by hearsay.

Q I am asking you if you learned, yes or no? You're very good at this with our witnesses. Now, you answer yes or no.

THE COURT: Now, Mr. Kavanaugh, I don't want any comments on your part. The jury is instructed it is stricken from the record and the jury is instructed to disregard them.

MR. KAVANAUGH: I apologize to both the witness and the Court.

Q Mr. Kassner?

A Yes, I knew there were tape recordings of Dexter Morton and Earl Jones, statements.

Q Did you know in those tape recordings Earl Jones and Dexter Morton implicated Jerry Gomberg and George Kaplan to the commission of

102

Kassner - Defts - cross

these fires?

A Some of those were read into this case, weren't they?

MR. KAVANAUGH: Would you ask the witness to be responsive, that's all I'm asking.

THE COURT: Would you read the question. Excuse me, I remind you again, Mr. Kassner, that you are in a dual capacity, and if you wish to make objections to any of the questions, you certainly are entitled to do so.

MR. KASSNER: Yes, your Honor, thank you.

A Of course I knew that they had implicated Mr. Gomberg and Mr. Kaplan. There came a time when I knew it.

Q When was that?

A I can't tell you the exact time. It may have been -- my partner was handling them, I wasn't handling them, so I can't give you any real time. It may have been six months after we started representing them. It may have been nine months, I don't know.

Q Tell me this, Mr. Kassner: After your firm learned that Mr. Morton and Mr. Jones had implicated Mr. Kaplan and Mr. Gomberg in these fires, isn't it a fact Mr. Detsky, your partner,

103

Kassner - Defts - cross

continued to represent Mr. Morton and Mr. Jones in this case?

A I don't know that at all. I don't know that at all.

Q Did you ever have any discussions with Mr. Detsky about what Mr. Morton and Mr. Jones told the New York City Fire Department about what Mr. Kaplan and Mr. Gomberg had done in the commission of these fires?

A I don't understand the question.

Q You don't understand the question. Okay, let me see if I can rephrase it.

Did you ever have any discussions with Mr. Detsky about the fact that Mr. Detsky had listened to some tape recordings in which Dexter Morton and Earl Jones had said that Jerry Gomberg and George Kaplan had hired them to set the fires in this case?

MR. KASSNER: Objection, Your Honor.

He's asking me for what my partner --

THE COURT: Sustained.

MR. KAVANAUGH: Your Honor, Dexter Morton and Earl Jones --

THE COURT: Objection is sustained.

104

MR. KAVANAUGH: If I bring in Dexter Morton and Earl Jones that they waive that privilege, will you allow me to ask Mr. Kassner that question?

THE COURT: No. The objection is sustained. Get on to something else.

Q Tell me this, Mr. Kassner: Does your firm do any work for Mr. Hodas aside from work related to the massage parlors?

MR. KASSNER: Objection; asked and answered.

A I did work for them.

Q I'm sorry?

A I said I did work for them.

THE COURT: Sustained.

Q You said you did not work for them?

A I did work for them.

Q You did work for them. Okay, thank you. And you've worked for them for approximately two years; correct?

A That's what I said.

Q Good. I'm just trying to go back over your direct testimony.

A I didn't know you were asking me a question. I thought you were refreshing your recollection.

105

Q A little of both, Mr. Kassner.

Now, during that period, approximately how much money had you been paid by Mr. Hodas?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

Q Tell me this, Mr. Kassner: Have you been getting a percentage of the take in any of these massage parlors as part of your fee for representing Mr. Hodas in this case or in any other cases?

A It is objectionable, but I'll answer it. Absolutely not.

Q Has your fees been paid simply on the legal work that you have done? You've got cash from the defendants to represent them?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

MR. KAVANAUGH: Your Honor, the witness answered he had.

THE COURT: I've sustained the objection. Now, please, next question.

Q Now, do you know why your law firm did not continue --

MR. KASSNER: Objection, your Honor.

Q -- to represent Mr. Morton and Mr. Jones?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

MR. KAVANAUGH: On what basis, your Honor, may I ask? I understand the Court does not have to give me a ruling, but I'd like to know. Possibly if it's the way I've asked the question, possibly it's a matter of law.

THE COURT: I'm not going to analyze your contentions at this point. Go on to the next question.

In the first place, let me say this: This is -- none of this interrogation is related to the direct examination of the witness. You realize that?

MR. KAVANAUGH: It goes to the witness's credibility and his interest in the outcome of this case.

THE COURT: It is all collateral and right there the matter, of course, is discretionary.

Now, next question.

Q Now, prior to when the fire marshals had reached the massage -- the Geisha House with that search warrant, and prior to when they found that container, did you know where the container was?

A No.

Q Did you know whether the container was in the Geisha House or not?

A No.

Q Was it Mr. Gomberg who was present at the time, during the time the search was conducted?

A I really don't recall. He might have been, but I don't recall.

Q What about Mr. Hoda?

A Oh, I recall he was not present.

Q He was not present?

A Definitely not.

Q What ~~xxxxxx~~ about Mr. Kaplan?

A He might have been, but I don't recall -- yes, yes, I do recall Mr. Kaplan was when at one time when they came in. He might not have been present at the time of the search. He may have left, but he was present when they came in.

Q Now, when the marshals came in, ~~thf~~ before they commenced their search, did they show you their warrant?

A Yes, they did.

Q Do you remember what the warrant said?

A No.

108

Q Do you recall at the time they ~~XXXXX~~ showed you the warrant, whether or not you knew what the fire marshals were looking for in that massage parlor?

A Whether prior to the time --

Q At the time the marshal showed you the warrant, after looking at that warrant, did you know at that time what the marshals were looking for? Did you know they were looking for gasoline?

A I don't recall what was in the warrant.

Q Well, did you know what the fire marshals were looking for when they entered that premises?

A No, didn't have the vaguest.

Q Did you ask them?

A No, they wouldn't tell me.

Q Did you ask them?

A Would you stop shouting at me, Mr. Kavanaugh.

Q I didn't know that bothered you.

A It does bother me.

THE COURT: Yes, it bothers me, Mr. Kavanaugh.

MR. KAVANAUGH: It may bother some other witnesses who testified in this case, and

Kassner - Defts - cross

760

he didn't have that ^{EX}courtesy.

THE COURT: Do you have further questions?

MR. KAVANAUGH: Yes, I do.

Q You never bothered to ask the fire marshals when they came to that premises and showed you that warrant what they were there for and what they were looking for?

A I may have asked them.

Q Now, you may have asked them?

A I may have asked them, but if I asked them, they didn't tell me.

Q But you don't know?

A I don't know.

Q But you say they may have told you when they entered those premises?

A I'm sure they didn't tell me.

Q If you're sure they did not tell you, if they had asked you -- withdrawn.

If they told you what they were looking for, I'm sure you would have asked Mr. Kaplan whether or not it was in the premises, wouldn't you?

THE COURT: Objection sustained.

110

Kassner - Defts - cross

Q So what you're telling -- Mr. Kassner, during the course of the search, I guess that the place was ripped up pretty badly?; correct?

A Yes.

Q And could you give us some idea of how much damage was done to the premises?

A My recollection is that they threw pillows from the furniture around the floor. There was at the bottom of various couches some weighted, I think it looked like pebbles or something that weighted the bottom of the couch, and they turned them over, and pebbles were all over the place. They knocked out ceiling tiles, they had thrown around drawers. It was a general mess after they got through.

Q Well, how much would you say it would have cost to fix that place up?

A It depends upon on the hourly rate of a laborer.

Q A laborer like Earl Jones or Dexter Morton.

Let me ask you this: Were you disturbed about the way the fire marshals had conducted the

///

investigation and the way they examined the premises?

A Well, it disturbed me.

MR. KAVANAUGH: ~~x~~ Your Honor, would you make him answer.

THE COURT: The answer is yes.

Q How long would you say the fire marshals were in that premises conducting that search, Mr. Kassner?

A My recollection was they were in there at least an hour.

Q At least an hour, and you're telling us that while the fire marshals were conducting this search, tearing this place up, while they were in there for that entire hour, you as an attorney never asked them what they were looking for; is that what you're telling us?

A No, I didn't tell you that at all. I told you I may have asked them, but they didn't tell me if I did.

Q Mr. Kassner, you don't ~~remember~~ recall whether you asked them or not, do you?

A No, I don't.

Q Did you ever ask?

A My memory isn't as good as your witnesses'.

Q Did you ever ask any of your clients whether or not there was gasoline stored in the Geisha House prior to the time when the fire marshals commenced that search, yes or no?

A Absolutely not.

THE COURT: Will you back off, please.

MR. KAVANAUGH: Thank you very much.

No further questions.

THE COURT: All right, you are excused, Mr. Kassner.

(The witness was excused.)

H E R B E R T L E V I N, called as a
witness in behalf of the defendants, being
first duly sworn, testified as follows:

THE CLERK: State your full name?

THE WITNESS: Herbert Levin, L-e-v-i-n.

THE CLERK: Address?

THE WITNESS: 15 Andrews Drive, Massapequa
Park, New York.

DIRECT EXAMINATION

BY MR. KASSNER:

Q Mr. Levin, are you married?

A Yes.

Q How many children do you have?

A Five.

Q By whom are you employed?

A By several corporations that Mr. Hodas is president of.

Q Have you ever been convicted of a crime?

A No.

Q Any crime?

A No.

Q Mr. Levin, what is your job in connection with 414 Theatre Corp.?

A I manage part of the operation. I keep the books and records, pay the bills.

Q What is the business of 414 Theatre Corp.?

A 414 Theatre Corp. is a corporation that has a lease on a store on 42nd Street.

Q At what address?

A At 414 West 42nd Street.

Q Does 414 Theatre Corp. operate the store?

A No.

Q Then what does it do with the store?

A It subleases the store, and at one time we had equipment in there.

114

Q Do you know the name of the store that is operating under that sublease?

A I believe it's the Geisha House.

Q Now, what is the function of 414 Theatre Corp. with respect to that premises?

A It is just subleasing arrangement.

Q In other words, you pay rent to a landlord and you collect rent from a tenant?

A That's correct.

Q And you collect more rent than you pay; is that right?

A That's correct.

Q And the difference is the profit?

A Right.

Q Do you know if Mr. Hodas any any interest at all -- or had any interest at all in the Geisha House operator?

Do you know what I mean by the "Geisha House operator," the one who is actually operating the massage parlor, during the months from April, 1972, through July, 1972.

A As far as I know, he didn't have any interest at that time.

115

Q Do you recall attending a meeting of sorts at the Dixie Hotel some time in the early part of the year 1972?

A Yes.

Q Would you tell the jury to the best of your recollection, what brought you to that meeting?

MR. KAVANAUGH: Objection, your Honor. Could we have a side-bar and possibly clear it up and I'll withdraw my objection?

MR. KASSNER: I'll rephrase the question rather than waste time with a side-bar.

THE COURT: I don't know what he's objecting to.

MR. KAVANAUGH: From the witness's answer, I assume he said that the early part of 1972 the meetings at the Dixie Hotel have been before this Court, are meetings —

THE COURT: Between May and July?

MR. KAVANAUGH: No, it was several weeks in July, early July and late June, and then after July.

Now, I don't see what these meetings have to do with anything in this case.

THE COURT: I assume he's talking about

* * *

116

We have coin ~~spark~~ operated film viewing machines in the City. We have a contract ~~of~~ with mechanics that service and maintain this equipment.

Q Do you know if -- do you work with Mr. Hodas or are you familiar, to your own knowledge, with all of ~~the~~ Mr. Hodas's business interests?

A Pretty much.

Q Now, as a real estate managing company, what exactly does that involve?

A Well, we lease property and ~~in~~ in turn sublease ~~in~~ it to other people.

Q Do you know if Mr. Hodas is involved in any way ~~in~~ in the act of management of any massage parlors here in New York?

A No, he isn't.

Q Not at all?

A No.

Q Do you know if he has any agreement, with anyone concerning the sharing of ~~prop~~ profits received from the running of a massage parlor here in New York?

A Not to my ~~km~~ knowledge.

Q Now, you indicated, I believe that Mr. Hodas's interests were to sublease at 414 West 42nd Street again in July of 1972, is that correct -- April of 1972?

MR. KASSNER: Objection, Your Honor. He did not say that.

THE COURT: Sustained.

Q What is Mr. Hodas' interest in the Geisha House?

A In the Geisha House?

Q Yes, sir.

A He is an attendant that subleases.

Q How long has that sublease been running?

A I would say about two years.

Q From now, from today -- from December of 1973 you say it would go back to December of 1971?

A I believe it was about either late December or early January.

Q Of 1971 or 1972?

A In 1972, yes, January.

Q Do you know if at all during that period from December of 1971 -- withdrawn.

How long has Mr. Hodas been subleasing the Geisha House to Mr. Kaplan and Mr. Gomberg?

A I would say from that period of time.

Q And, prior to that did Mr. Hodas have any interest, to your knowledge, in the Geisha House, aside from subleasing the premises?

MR. KASSNER: Objection, Your Honor, on the grounds it is outside the scope of the inquiry in this case. He is talking about prior to 1972.

THE COURT: Would you read the question, please.

(Whereupon, the reporter then read back the last question.)

THE COURT: I will take it.
Overruled.

A Could you repeat that question?

Q Prior to December of 1971,

Mr. Levin, did Mr. Hodas have a lease on the premises now known as the Geisha House?

A We had the lease, yes.

Q You had the lease?

A Yes.

Q How far back does that lease go?

A I believe it goes back to 1969.

Q And, correct me if I am wrong, from 1969, to the best of your knowledge, to the present date, Mr. Hodas' sole interest in the Geisha House has been one of a ~~lessor~~ lessor to lessee, he has leased the premises out to Mr. Kaplan and Mr. Gomberg or to other ~~per~~ people?

MR. KASSNER: Objection, Your Honor. That was not what he testified to.

MR. KAVANAUGH: I am just asking him.

MR. KASSNER: Is that a question?

THE COURT: Will you ask him then whether that was his interest as a lessee?

MR. KAVANAUGH: I will do that.

Q From 1969 to the present date,

to your knowledge, is Mr. Hodas's sole interest in 414 West 42nd Street now known as the Geisha House, be that simply of a person holding a lease, subletting it to other possible or prospective tenants?

A No, sir.

Q It hasn't?

A No, sir.

MR. KASSNER: I would like to object to any inquiry that go beyond the dates of the alleged crimes in this case, the facts in this case which go back to April of 1972.

THE COURT: I think we have had enough of the history of the Geisha House.

MR. KAVANAUGH: If I just may continue somewhat I think I will develop this and I think the Court will then overrule counsel's objection.

THE COURT: Just a few more questions, go ahead.

MR. KAVANAUGH: Thank you.

Q Would you describe what other

interests Mr. Hodas had in 414 West 42nd Street between the period of 1969 until today.

MR. KASSNER: Your Honor, I object to the question on the grounds he is covering a period outside the scope of inquiry in this case.

THE COURT: Overruled.

A Originally, we had opened it up as a store with our equipment in it.

Q Equipment meaning the machines, is that correct?

A That is correct.

Q When did you take the machine -- withdrawn.

Did you ever take the machines out?

A We did for a period of time.

Q When Mr. Kaplan and Mr. Gomberg came in and sublet the Geisha House from your corporation, did you take any of the machines out do you recall?

A We pulled some equipment, we had some equipment that we pulled out, and we replaced it

after a while with smaller units.

Q You replaced it with smaller units while Mr. Kaplan and Mr. Gomberg were operating their business in the premises, correct?

A That is correct.

Q What ~~xxx~~ arrangement was made in terms of the revenues from these machines, in terms of the sharing of these revenues, do you know?

A We never received a revenue from those machines at that time. There was a fixed rate that we would get for the rent and for the equipment that was on the premises.

Q That would be paid to you by Mr. Kaplan and Mr. Gomberg, correct?

A Either them or someone else.

Q Who else?

A This fellow Sam, he works there.

Q Do you remember his last name?

A No, I don't recall his last name.

Q Aside from that fixed ~~xx~~ rate you were receiving a monthly sum in terms of rent from

those premises, is that correct?

A It was ~~affixed xxxxxxxx~~ a fixed weekly rate that would be considered the rent.

Q From say December of 1971 until July of 1972, do you recall what that weekly rate was?

A It was four hundred dollars rent and two hundred dollars for the machines.

Q And, to the best of your knowledge that was the only revenues that Mr. Hodas was ~~xxxxxxxx~~ receiving from the Geisha House while it was operating as a massage parlor, is that correct?

A That is correct.

Q Now, you worked for Mr. Hodas for some time, are you familiar with his signature?

A Yes.

MR. KAVANAUGH: May I have this marked People's Exhibit 2 for Identification, Your Honor.

THE COURT: Well, we will deem

it marked People's Exhibit 2 for Identification.

(Whereupon, the above mentioned document was ~~x m~~ deemed marked People's Exhibit 2 for Identification.)

MR. KASSNER: May I see it?

MR. KAVANAUGH: I would like to show it to the witness, first.

MR. KASSNER: I don't understand why you insist upon being shown ~~him~~ it first when it is your witness on the stand, Mr. ~~Kann~~ Kavanaugh.

THE COURT: Show it to defense counsel.

All right.

Q Can you tell me, looking at this signature, looking at People's Exhibit 2 for Identification, without reading ~~ix~~ the contents, can you tell me if that appears to you to be Mr. Hodas' signature?

A It appears to be his signature, yes.

Q Can you state with any certainty

whether or not that is his signature?

A I couldn't state with certainty. I didn't see him sign it.

Q ~~Am I to~~ appreciate that. Were you at any time aware of any agreement that Mr. Hodas had entered into with Mr. Valentine, Mr. Gomberg and Mr. Kaplan written Mr. Hodas would be a full twenty-five percent partner in the Geisha House?

A No, sir.

Q Let me show this document -- one other question.

Do you know a ~~company~~ a company by the name of East Coast Signomatic, Inc.?

A Yes, sir.

Q Do you work for that company?

A Yes, sir.

Q Who is the president of that company?

A Mr. Hodas.

Q How ~~mid~~ long has that company been in business?

A I would say for at least five years; for

the period of time that I worked.

Q I ask you to look at People's Exhibit 2 for Identification, if you would, Mr. Levin, and if you could read it, please to yourself.

THE COURT: He has read it apparently, Mr. Kavanaugh.

MR. KAVANAUGH: I'm sorry.

Q Have you ever seen that document before?

A No, sir.

Q Let me ask you this:

Do you recognize -- have you ever seen -- withdrawn.

Have you ever seen that stationary before or a copy or stationery that was similar to that?

A Yes, that is our office stationery.

Q The East Coast Signomatic, Inc.?

A Right.

Q So, to your knowledge-- withdrawn.

In terms of the business at the Geisha House, what was being run at the Geisha House is commonly known as a massage parlor; is that correct, Mr. Levin?

A That's correct.

Q And, to your knowledge, the only interest that Martin Hodas had in that operation, from the time that you were working for him, was that he received a set rent from the machines that were in those premises and a set rent for the premises itself; is that correct?

A That is correct.

Q And that Mr. Hodas did not receive any percentage of the profits that were obtained from the subsequent running of that entire business; is that correct?

A To my knowledge, yes.

Q Now, has Marty Hodas-- excuse me-- Martin Hodas ever asked you to take a lie detector test?

A Yes.

Q How many times?

MR. KASSNER: Objection, your Honor, on the whole line of inquiry. This has nothing

AFTER RECESS

THE CLERK: Case on trial continues.

Defendants are present, the attorney is present, assistant district attorney is present. The jury is not present in the courtroom.

(Whereupon, the jury enters the courtroom.)

THE CLERK: Case on trial continues.

All litigants are present, including the entire jury panel.

THE COURT: Mr. Kassner, will you call your next witness.

M A R T I N J. H O D A S, one of the
~~witnesses~~ within named defendants, called as a
witness in his own behalf, being first duly
sworn, testified as follows:

THE CLERK: Be seated.

State your full name and spell your
last name, please.

THE WITNESS: Martin J. Hodas, H-o-d-a-s.

THE CLERK: Address?

THE WITNESS: 37 Harbor View West,
Lawrence, Long Island.

DIRECT EXAMINATION

BY MR. KASSNER:

Q Mr. Hodas, what business are you in?

A Well, I am in a few businesses. I have a coin-operated movie machines. I have some real estate I sublease, a couple of -- I think at two different locations.

Q Are you married?

A Yes.

Q How many children do you have?

A Four.

Q Mr. Hodas, have you ever been convicted of a crime anywhere at any time?

A No.

Q Are you the principal of a corporation known as 414 Theatre Corp.?

A Yes, I am.

Q Did you hear the testimony of Mr. Levin relating to that corporation and what it does?

A Yes.

Q Was that testimony correct?

A Wholly.

Q Insofar as the premises at 414 West 42nd Street are concerned, did you ever have any interest in the operation of the massage business at that premise?

A Yes, I did.

Q During what period did you have an interest?

A I think when they first built the massage parlor there, it was somewhere around the winter of 1971. And then my interest in it terminated about I would say eight months later, somewhere around that time, between six, eight, ten months later.

Q When did it terminate?

A In about December of 1971.

Q When you say the winter of '71, are you talking about January or February, 1971?

A No, no. December of 1971.

THE COURT: Is this the Geisha House?

MR. KASSNER: The Geisha House, yes.

Q When did the interest terminate, in December of '71?

A No, we went into it in 1971, in about December of 1971, November or December of 1971 I entered into an agreement to go into the massage parlor. I had the machines in there. They were doing very badly.

They came to me and said they wanted to

build a massage parlor there. So I said, "Okay." I said, "Go ahead." And then I took most of the machines out and just left a few small ones in. I was given a twenty-five per cent interest for my, you know, being my place and so forth and so on.

Q In November or something, about November of '71, you were given a twenty-five per cent interest in that massage parlor?

A That's right.

Q Now, when did this twenty-five per cent interest terminate?

A In about December of 19 -- hold on now. I just want to get '71 and '72 correct. Roughly about a year later.

Q Are you telling me that at the time of the fires --

MR. KAVANAUGH: Objection, your Honor.

Q -- in May --

A Hold on, hold on.

THE COURT: Sustained.

A I am trying to get the dates, like December of '71 to January of '72. I know I entered into

an agreement in January of '72 -- no, it wasn't a year later, it had to be a couple of months later then. I entered into an agreement in January, '72, to sublease the premises. So it wasn't a year later. Excuse me, I have '71 and '72. It was a couple of months later then.

Q Why did you enter into that new arrangement in January, 1972?

A Because Nick Valentine had -- I was also associated with the Harem for a short time with the same position there. I had machines there. They also came to me and they -- Nick Valentine came to me with George and Jerry and said they wanted to put a massage parlor in there and they would give me a piece, you know, for letting them use it.

I said "Okay." I wasn't familiar with the operations or anything at those times. The Harem came first and I let them go ahead and put a massage parlor in there.

There was nothing but trouble with Nick. We found out he was an alcoholic. He was drunk all the time. I never saw the man sober. He did things that ~~were~~ were unbelievable. I ~~have~~ heard others that--

MR. KAVANAUGH: Objection, Judge.

THE COURT: Overruled.

MR. KAVANAUGH: Your Honor, the witness just said -- excuse me, just said "I ~~heard~~ heard stories."

THE COURT: He is giving a reason why he terminated his association with Valentine.

MR. KAVANAUGH: I will withdraw the objection.

A (Cont'g) He used to beat up girls down in the parlor, and girls were leaving. He took a register about a month after he was in there, he came in with an iron pipe and just beat a register up.

Q What kind of register, cash register?

A Cash register.

What happened was, finally it terminated. He came in one day and broke all the windows and he smashed the place to smithereens. This is what actually still considered my property. I was on the lease. So, the next day I went down there and Martha Valentine was there, his common-law wife, and I told her I wanted you out.

She put up a little fuss and I went

134

Hodas - Deft - direct

ahead and called the police. I said, "I don't want you here anymore." I said, "If you don't get out, I will have charges preferred against Nick.

I went ahead and called the police, and the police had to go ahead and put her out forcibly.

Q When did this take place?

A Roughly -- to be honest with you, *I just can't recollect. It was somewhere right about that time, November, December. Just about November, December, 1971.

Q As a result of that, did you learn that Nick Valentine was bought out of the business?

A Yes.

Q And that created a new arrangement between you and Jerry and George?

MR. KAVANAUGH: Objection to leading the witness.

THE COURT: Yes.

Q You stated you came to a new arrangement?

A Yes, once Nick Valentine was out. I knew Jerry and George before that. Nick Valentine I had known for a very fleeting moment. I met him and I

135

Hodas - Deft - direct

didn't know him well. And with all the trouble, once Nick Valentine got out of the business, I wanted different arrangements made in these parlors. I didn't want to have anything to do with them anymore. All I wanted to do is just collect rent. I didn't want anything to do with the operation of massage parlors after that.

Q Was there any rigorous law enforcement against massage parlors during the early part of '72?

MR. KAVANAUGH: Objection.

THE COURT: I don't know what the relevancy of it is.

MR. KASSNER: I will connect it, your Honor.

THE COURT: I will take it.

MR. KAVANAUGH: What does "rigorous law enforcement" mean?

THE COURT: Let's hear the next question.

BY MR. KASSNER:

Q Would you answer the question.

A Yes.

MR. KAVANAUGH: Objection.

THE COURT: I overruled it.

Hodas - Deft - direct

MR. KAVANAUGH: I am sorry, Judge.

A Yes, there were a lot of, I would say there was a lot of harassing tactics being made by the City of New York, various different agencies.

THE COURT: I will sustain an objection to that. Please, don't characterize it. Just say what happened.

Q Did you learn of any concerted drive by the City to close up massage parlors?

A Yes.

Q Did that have any part in your decision to disassociate yourself from a massage parlor part of these premises?

MR. KAVANAUGH: With all due respect, I wish Mr. Kasner wouldn't lead his witness. I object.

THE COURT: I sustain the objection.

Q Mr. Hodas, did any other factors come into your decision to remove yourself from the massage parlor aspect of those premises?

A There were many factors.

Q As of January, 1972, you no longer had any interest in the Geisha House Massage Parlor operation; is that correct?

137

Hodas - Deft - direct

A Absolutely.

Q 414 Theatre Corp. was a straight landlord-tenancy relationship; is that correct?

MR. KAVANAUGH: Objection.

THE COURT: Sustained.

Q What was the relationship of 414 Theatre Corp. to Gomberg and Kaplan, the massage parlor operators on the premises?

A I solely collected rents, and my books will verify that.

Q Now, you heard Mr. Levin testify as to a meeting in the Dixie Hotel. The best he could identify time which was April, May, or June, 1972. Is that correct?

MR. KAVANAUGH: Objection. It wasn't Mr. Levin's testimony.

THE COURT: Sustained.

Q Did you hear Mr. Levin's testimony?

A Yes, I did.

Q Was it true?

A Yes, it was.

Q Was it true in all respects?

A Every single word.

Q Now, aside from the time that Mr. Levin

Hodas - Deft - direct

835

described of the Dixie Hotel meeting with Nick Valentine and others, Johnny Shocker, aside from that, did you ever meet Nick Valentine in the Dixie Hotel?

A No. I had one meeting with Nick Valentine in the Dixie Hotel. That was the meeting, the sole meeting.

Q Now, Mr. Hodas, did you at any time ever discuss a fire with Earl Jones, ~~Earl~~ Dexter Morton, or Chris Hatton?

A I met Earl Jones once in my life for about two minutes. He could have never recognized me.

Q Why don't you just answer the question I asked you?

A No, I never discussed the fire with him.

Q Did you ever hear George Kaplan or Jerry Gomberg discuss any fire with any of those three people?

A Never.

Q At the time of the fires at the Palace and the French Studio in May and July, 1972, did you have any interest in whether the Geisha House as a massage parlor made money or didn't make money?

139

Hodas - Deft - direct

A I couldn't care less.

Q Now, there was testimony in this trial that you had said to one of the prosecution witnesses: "It's no skin off my nose."

A That conversation never took place anywhere.

Q In May, June, and July, 1972, the sole interest you had in the Geisha House operation was the collection of a fixed rent; is that correct?

MR. KAVANAUGH: I will object, your Honor.

THE COURT: On what grounds?

MR. KAVANAUGH: It is leading. He had his opportunity to testify.

THE COURT: Sustained.

Q What was the sole interest that you had in that property at 414 West 42nd Street during the months of May, June, and July, 1972?

A I held the lease on the property. I subleased the property to Jerry and George. I collected rent. That's all.

Q Did how much money they made in the massage parlor make any difference to you from the point of view of your income?

A No.

140

Hodas - Deft - direct

Q During that period.

Now, you heard a conversation about Chris Hart coming to your office and speaking to you in your office?

A No, I wasn't present in my office.

MR. KAVANAUGH: The second conversation --

THE COURT: Finish the question first.

Q Mr. Levin discussed a time when he came into a store in which you had an office in the back?

A Right.

Q What is that address?

A 259 West 42nd Street.

Q When did this take place?

A About a month ago, three weeks ago.

Q Do you recall what Chris Hart said to you and what you said to Chris Hart?

A Yes, I do.

Q Would you tell the jury.

A Chris came in to me and he was half bombed, for him that's pretty good. He said to me, "Harty, I need one hundred dollars."

I said, "What do you want a hundred dollars from me?"

141

Hodas - Deft - direct

He said, "You got a lot of troubles."

I said, "What kind of troubles do I have?"

He said, "The district attorney wants me to implicate you in this fire here that happened."

So I said, I said, "What do you want me to do about it?"

He said, "If you don't ~~mak~~ give me one hundred dollars, I am going to tell the district attorney every single word he tells me to say."

I said, "Get the --" I said, "Chris, get lost." And he just left and that was it. I never saw him after that until here.

MR. KASSNER: I have no further questions.

THE COURT: Mr. Kavanaugh.

CROSS-EXAMINATION

BY MR. KAVANAUGH:

Q Mr. Hodas, let me show you People's Exhibit -- has this been deemed marked or marked, your Honor?

THE COURT: Deemed marked.

Q Let me show you People's Exhibit 2 deemed marked for identification.

142

A I saw it.

Q Do you recognize this?

A Absolutely.

Q What is this?

A That is a --

MR. KASSNER: Hold it.

THE COURT: What is the ground of your objection?

MR. KASSNER: I would like him to put it in evidence if he is going to have it.

A May I take another look at it?

Q Yes.

MR. KAVANAUGH: May I have it received in evidence then, your Honor?

MR. KASSNER: May I see it.

THE COURT: Received as People's Exhibit 2.

(The aforementioned document previously deemed marked People's Exhibit 2 for identification was deemed marked People's Exhibit 2 in evidence.)

BY MR. KAVANAUGH:

Q You indicate you recognize People's Exhibit 2 in evidence. What is that?

A That's an agreement that --

143

MR. KASSNER: If your Honor please,
the agreement speaks for itself.

THE COURT: Overruled.

A It is an agreement that the four of us had
signed, as I recollect the date, November, 1971.

Q Would you look at it.

A I remember it. November, 1971, as to me
having a twenty-five per cent interest in the
massage parlor there.

Q And that twenty-five per cent interest,
am I correct, would cover all the profits that
were taken in in the operation of the Geisha House?

A That's exactly -- at that time of this
signing, that's exactly what it was.

Q Thank you, Mr. Hodas.

Mr. Hodas, you heard Mr. Levin indicate
that he had discussed his testimony with you
prior to coming in here today.

Do you recall that?

A Yes, we had discussed it.

Q And during that time, did you ever
discuss with him the interest that you were having
in the 414 West 42nd Street?

A This only lasted for about one month or so.

144

17

Hodas - Deft - cross

Herb knew I wanted nothing to do with ~~that~~
massage parlors.

THE COURT: Again, we are talking
about the Geisha, I take it?

MR. KAVANAUGH: Yes.

Q Before Mr. Levin testified then you
had not discussed that, the existence of that
agreement with him; is that correct?

A No, never discussed this agreement with him.

Q Never mentioned it to him at all?

A No.

Q Never mentioned it to him --

MR. KASSNER: If your Honor please,
he answered the question three times, same
answer.

Q I am sorry. Go ahead, Mr. Hodas.

MR. KASSNER: Wait until the next
question.

Q When you discussed this with him,
was anyone else present?

MR. KASSNER: Discuss what with who,
your Honor?

MR. KAVANAUGH: Discuss the agreement.

A I told you I didn't discuss the agreement.

145

Hodas - Deft - cross

MR. KASSNER: He said he didn't discuss it.

THE COURT: Just a minute. Start over.

Q When you discussed Mr. Levin's testimony, who else was present?

A My attorney..

Q Mr. Kassner; is that correct?

A Yes.

Q And at that time, did Mr. Kassner discuss Mr. Levin's prospective direct testimony, to your knowledge, to your recollection?

A Let me get this straight, prospective direct testimony?

MR. KASSNER: Objection, your Honor.

THE COURT: Yes, sustained. Let's not get too legalistic.

MR. KAVANAUGH: I am sorry, Judge.

Q Did Mr. Kassner discuss with Mr. Levin what Mr. Levin was going to testify to here today?

MR. KASSNER: Objection, your Honor.

A No.

THE COURT: Overruled.

A He just asked him, he asked Herb what the story was. You know what I mean, what he had to

Hodas - Deft - cross

testify about.

Q What did Mr. Kassner say when he asked him what he was going to have to testify?

A Mr. Levin told him just exactly what he was going to say, and Mr. Kassner nodded and said "Okay."

He said, he gave him a few rules like --

Q I understand.

So, if I am correct then, in your presence, Mr. Levin indicated to Mr. Kassner that he was going to reveal to this jury that the only interest he knew of that you held in the Geisha House, as long as he has been working for you, was that of a person leasing a premise and receiving a fixed rent for that lease and also for a fixed rate for the machines that were in that parlor; is that correct?

MR. KASSNER: Objection, your Honor.

Q Is that the sum --

MR. KASSNER: That was not done on direct examination. That was done on cross-examination. I never asked the question. Mr. Kavanaugh asked the question. It wasn't the subject of my

preparation and it involved a time prior to the time in issue in this case which I wouldn't cover.

THE COURT: Let's not have any speeches, please. The question is a little involved. Frankly, I am lost.

MR. KAVANAUGH: I am sorry, your Honor, excuse me.

Q At that meeting, Mr. Hodas, did Mr. Levin indicate to Mr. Kassner that as far as he knew, the only interest that you had ever had in the premises now known as the Geisha House was that as a person, of a person who was renting machines and who was renting the premises?

A That is correct.

Q And during that entire discussion, did you ever indicate to Mr. Levin, did you ever indicate to Mr. Kassner that you had held for I believe you say a month --

A It was about a month and I never received --

Q The twenty-five per cent interest in the total profits that were taken from the Geisha House?

A No, and there was a reason --

Q What is the reason?

148

Q What is the reason?

A The reason is that Nick Valentir when we signed this agreement, Nick Valentine was the man that wanted this agreement signed because I was friendly at that time with Jerry and George.

We didn't need any agreements. A hand shake amongst us was good enough. Nick Valentine came up and said he wanted some kind of an agreement to protect his interest. He went ahead and had this agreement drawn up and there in my office.

First it was written out and he said he wanted it typed or something. I forgot who typed it. One of the girls or something.

I never considered myself as a partner in this place even though it's down there here and everything, it was never considered because there was no money that was made at the beginning. It was a very short time, and as soon as Nick was out the entire operation changed.

In other words, there was no profits or anything. All I did was collect my rent. I know this agreement was in existence except it was never like really followed because it was such a short period of time and there was never any money

149

made at the beginning. It was the first month that the place was opened, I believe we lost money.

Q Am I correct in stating that at the time this was discussed with Mr. Levin in your presence, you knew of the existence of that agreement?

A Absolutely did.

Q You did not disclose it to Mr. Levin at all while he was discussing the case with Mr. Kassner?

A I didn't think it was important at all.

MR. KAVANAUGH: At this time I ask the agreement be shown to the jury.

THE COURT: All right.

(Whereupon, People's Exhibit 2 in evidence was handed to the jury.)

MR. KASSNER: Your Honor, can't we go on with the cross-examination while that thing is being circulated?

MR. KAVANAUGH: It is very brief. I would like to have the jury's full attention, in fairness to them and in fairness to Mr. Hodas.

THE COURT: I think two or three minutes

150

Hodas - Deft - cross

should do it. As long as it's in evidence, why not read it?

MR. KAVANAUGH: I would be more than happy to do it.

Would the Court wish to read it?

THE COURT: You can read it.

MR. KAVANAUGH: "November 8, 1971, agreement on 414 West 42nd Street.

"Martin Hodas agrees to take in as partners, George Kaplan, Jerry Gomberg, Nicholas Valentine for twenty-five per cent each on the location 414 West 42nd Street.

"We will all be full twenty-five per cent partners and the business will assume all responsibilities and share in the profits equally.

"The above three mentioned will invest the necessary monies to build a massage parlor in the rear and Hodas will remove all the necessary machines to make space and we will all share in the profits of the remaining machines."

The agreement contains the typed names of Martin Hodas, Jerry Gomberg, George Kaplan,

151

Nicholas Valentine. It contains Mr. Hodas's signature next to it and other signatures on there next to each of those names.

BY MR. KAVANAUGH:

Q I believe, and correct me if I am wrong, Mr. Hodas, that you in addition to the interest that you had at the -- for the very short period of time at the Geisha House, did you also have a similar interest in a place called the Harem?

Is that correct?

A That is correct.

Q What was your interest in the Harem?

A ~~an~~ Exact same agreement as that, I believe, was signed.

Q Twenty-five per cent of all?

A They built the massage parlor. I was ready to close the store down. They built the massage parlor and they gave me twenty-five per cent because I had the store, like the air conditioning and lease and so forth.

Q How long was that agreement, that twenty-five per cent profit in existence?

Hodas - Deft - cross

A That agreement was in existence a very short time also. What happened was after --

Q THE COURT: That's the answer.

THE WITNESS: Okay.

A A very short time.

Q Let me ask you this: Did you ever tell Mr. Levin that you had an interest in the Harem?

A No.

Q You never told him at all?

A No.

Q How long did Mr. Levin work for you?

A This was three years ago. At that time he was working for me for about two and a half years or so, I think.

Q And your interest in the Harem was when?

A Also I believe about three years ago.

Q About three years ago.

Let me see if I understand this then, Mr. Hodas. You are telling this jury you had an interest in the Harem Massage Parlor with George Kaplan, Jerry Gomber, and Nick Valentine three

years ago; is that your testimony?

A Hold on now. Let me get dates.

Q Would you like to correct that?

A Hold on. Let me get dates. Maybe two and a half years. Let's put it this way: I would rather say at this time, unless I took time out, that I couldn't recollect the exact time.

Q I understand it's a long time ago.

Now, aside from the Geisha and the Harem, did you ever have an interest in any other massage parlor here in New York like the interest you just described to this jury?

MR. KASSNER: Your Honor, I object to the question.

THE COURT: Overruled.

Q Mr. Hodas?

A Not an interest. What happened was they opened up another massage parlor and I --

Q Who is "they," sir?

A Jerry and George, without Nick. And I had actually nothing to do with it, but I did help them get started in it.

In other words, I used my business,

154

you could say, ability, too. But I never had any actual profit or anything from it.

Q What was the agreement?

A I don't recollect.

Q What did you put up for that agreement, Mr. Hodas?

A I can't recollect. I don't remember. This is going back about three years ago. I don't ~~xxx~~ remember. There were other places, but I can't recollect rightfully just exactly what they were or where they were.

Q How many other places?

A I know I never received any money from any other massage parlor2 .

Q How many other places?

A I remember a time when -- I had nothing to do with --

MR. KASSNER: I reiterate my objection as being completely outside the scope of this trial, serving no reason whatsoever and being completely irrelevant.

THE COURT: Overruled.

A I couldn't rightly recollect. I know there was one that they had and closed down.

Q When you x say "They," you are referring to Mr. Kaplan and Mr. Gomberg?

A Jerry and George. I know Nick had nothing to do with after the breaking up of the Harem it was all over.

Q Aside from the Harem and the Geisha Mr. Hodas was the one other place two other places, more than two?

A Absolutely not.

Q Absolutely not more than two?

A No. In fact I could state this. I never received a dime from any other massage parlor in the City except from these two places because I had the original lease.

Q Now, how long did Mr. Levin work for you?

A I believe he stated somewhere back in --

Q Not what he stated what you recall Mr. Hodas --

A Because a long time ago, he must have

156

started in 1968.

Q 1968 and what is exactly his title if you remember?

A Title?

Q Yes, sir.

A I guess you could say he is my -- well, he does a little bit of everything, ~~ex~~ you could say.

Q Like what?

A Generally makes collections and -- he oversees the help.

Q When you say he makes collections, does he run your books?

A Yes he takes care of the books.

MR. KASSNER: Your Honor, I object to this whole line of questioning. It ~~is~~ is far afield for no purpose whatsoever. It is totally irrelevant.

MR. KAVANAUGH: I think I will make the connection in a few minutes, Your Honor, and a few questions.

THE COURT: All right, I will let you continue, but I wish you ~~would~~ would get to the point.

157

MR. KAVANAUGH: Yes, sir, I will.

Q Did he keep your records, ~~final~~ financial records?

A Going back --

Q Mr. Hodas, doesn't he keep your financial records or doesn't he?

A You are telling me right now, he keeps my financial records right now.

Q How long has he done that?

A There was also another man that I had working for me.

THE COURT: The question is how long did he keep your records.

THE WITNESS: He hasn't kept my records all the time, but he has done that for about five years, I guess.

Q About five years, so during the time that you had entered these arrangements were Mr. Kaplan and Mr. Gomberg and also with Mr. Valentine, Mr. Levin kept your records, correct?

A That is correct, kept ~~final~~ financial records.

Q And, you used these records for income tax purposes, didn't you?

When you filled out an income

158

tax form, you used these records, didn't you?

A I ~~image~~ imagine so.

Q Well, who filled out your income tax forms?

A I ~~have~~ have an accountant.

MR. KASSNER: Objection, Your Honor.

THE COURT: Sustained.

MR. KASSNER: Is this an audit or a trial on a specific issue of fact?

THE COURT: I sustained the objection to that question. Now, I assume that Mr. Kavanaugh is coming right to the point.

Q Did you ever claim any loss for the investments you made with Mr. Kaplan, Mr. Gomberg and x Mr. Valentine?

MR. KASSNER: Objection, Your Honor.

THE COURT: Overruled.

MR. KASSNER: We haven't ~~that~~ determined that there was a loss, Your Honor.

A I was just going to say there was no loss.

MR. KAVANAUGH: There was no loss?

MR. KASSNER: When I object to a question you don't answer the question.

THE COURT: Thank you, sir.

MR. KAVANAUGH: Thank ~~you~~ you, Judge,

THE COURT: He is correct, though.

MR. KAVANAUGH: He is correct.

Q Would it be fair to say then --
withdrawn.

What did you invest in the Harem?

MR. KASSNER: Objection, Your Honor.

MR. KAVANAUGH: Your Honor --

THE COURT: Just one moment.

MR. KASSNER: If we are doing a tax audit, let's do it in the proper forum.

THE COURT: Will you please approach the bench?

X (Whereupon, the following was then recorded outside the hearing of the jury.)

MR. KAVANAUGH: Judge, the relevance of this is the following. Number one, x

160

on direct examination with Mr. Levin, it was ~~being~~ brought out that the only interest that Martin Hodas had to Mr. Levin's knowledge in the massage parlors was that of a ~~r~~ rentor.

Now, Mr. Levin was put on here and represented as a business associate of ~~him~~ some type of a manager for Mr. Hodas and I am suggesting to the Court now it is ~~incredible~~ inconceivable that Mr. Levin was testifying when he indicated that he did not know of these other arrangements, and I want to ~~bring~~ bring out the fact that he had to know.

Just a few more questions and I will be through with this area. ~~It~~ It goes to credibility.

MR. KASNER: Whose ~~and~~ credibility.

THE COURT: Yes, that's the question of ~~wh~~ whose credibility?

MR. KASSNER: Not at all. He was talking about Mr. Levin's credibility and that's a collateral matter.

MR. KAVANAUGH: It is extraneous

collateral matters, because he is telling this jury ~~if~~ he never told Levin.

It is also relevant what counsel has ~~xx~~ set ~~x~~ Mr. Hodas as simply a landlord and that is all he said Mr. Hodas was, and it is ~~xxx~~ clear he was more than thatn and has more than an interest in these places.

THE COURT: I don't know what you are getting at here and what you hope to establish. I meanX --

MR. KASSNER: He said during the period that an agreement was in affect he had an interest. He said in January of 1972 there ~~xxx~~ came a time when Valentine was thrown out of the business when the whole interest went away because that was an agreement between four peple.

I ~~am~~ don't understand what he wants.

THE COURT: I am going to curtail this line of questioning.

MR. KAVANAUGH: Just a few more

questions and I will be right off it.

MR. KASSNER: He has had ~~two~~ too many already, Your Honor.

MR. KAVANAUGH: Two or three.

THE COURT: All right, two or three.

(Whereupon, the following was then recorded within the hearing of the jury.)

Q Mr. Hodas, what did you invest in the arrangement for the Harem?

MR. KASSNER: Objection, Your Honor.

THE COURT: Overruled.

A Not a dime. That is because the whole agreement there was I had that place already, and I had that place for two years, and I was ready to close it because business was getting very bad.

THE COURT: All ~~right~~ right, ~~answer~~.

the answer is no.

Q But, you were to get twenty percent of the profits?

A That is correct.

Q And, you never told Mr. Levin this sir, is that correct?

A Yes.

MR. KASSNER: Objection, again we go through this same question.

THE COURT: Sustained.

Q Now, you indicated that you had gone down to one of the message parlors and ~~xxx~~ asked Nick Valentin's common law wife Martha Valentine to leave when she refused to do that, what did you do?

A Called the police.

Q Did you have her arrested?

A I ~~xx~~ told the police that if she didn't leave that I would go ahead and prefer charges against Nick for what he had done.

Q Against Nick. The question I asked is did you have Martha --

A No, she wasn't arrested.

Q She was not arrested?

A No, she left, the police asked her to leave and she left.

Q Now, as of May of 1972, the only interest that you had in any message parlor located

164

in New York was that of leasing several locations and machines that you had located in these massage parlors, is that correct?

MR. KASSNER: Objection, Your Honor, that is not in issue. In New York City is not in issue. Let's talk about the one that is in issue.

THE COURT: Will you read the question, please.

(Whereupon, the reporter read back the last question.)

A Just let me recollect. May of 1972.

Q At the time the Palace was burned down, possibly that would help you remember.

A At that time did I have interest in any other massage parlors? No, I had no other interest in any other massage parlors.

Q Well, did you have interest in any massage parlors?

A No.

Q You had no interest in any massage parlors at that time, is that correct?

A That is absolutely correct.

Q When was this agreement terminated?

165

A The agreement was terminated in January
of 1972.

Q I see.

Can I have a copy of the agreement
terminating that agreement?

A Well, Nick was out and like I say, I didn't need anything, any papers or anything, with Jerry and George. I have known them for quite a number of years.

Q You didn't need any papers with Jerry and George. What about Nick?

A My books--

THE COURT: Don't argue with him.

MR. KASSNER: O. K., you answered the question.

MR. KAVANAUGH: Your Honor, you know--

THE COURT: I think you should ask him first-- if you are interested in that line of inquiry-- whether there was a written agreement of termination.

Q Was there a written agreement of termination?

MR. KASSNER: Objection. The question has been asked and answered.

A No.

THE COURT: It's answered now.

A (continuing) How could there be a written agreement. I didn't want to see Nick any more.

Q There was no written agreement between Nick--

A (interposing) Right.

Q You had no wirtten agreement between you and George and Jerry because you were always able to work orally--

MR. KASSNER: Objection.

THE COURT: Sustained.

MR. KAVANAUGH: I'm just trying to lay the foundation for some questions. My examination will be far briefer than Mr. Kassner's.

THE COURT: He never asked that question.

Q Is that why you didn't have to enter a written agreement with Mr. Kaplan and Mr. Gomberg terminating this agreement?

MR. KASSNER: Objection.

THE COURT: Overruled.

A Give me that question again.

Q Why didn't you have a written instrument signed by George Kaplan and Jerry Gomberg terminating this agreement in People's Exhibit 2?

A Why didn't I have one?

Q Yes.

A Because I didn't need one.

Q Why not?

A Because it wasn't necessary. I had the lease in my name. The lease of the store was in my name. It was my store. I could have done anything I wanted at that time so I told them, you know, what I mean, "You run the massage parlor. From here on in, I want rent every month."

Q So, you didn't ask them for any written agreement for those reasons?

A We didn't have those agreements. They didn't have those agreements. I don't believe they did.

Q You're not sure?

A I'm pretty sure because I remember when he was signing it, I said, "What do you need all this nonsense? What do we need papers and all that?" They didn't want a copy of it.

Q But, I am correct in stating that you also did not have a written agreement-- a written instrument terminating this arrangement with Nick Valentine; is that correct?

A That's right; there's no termination.

MR. KASSNER: Your Honor, he asked the question five times.

THE COURT: I agree with you.

Q Now, how long-- withdrawn.

Do you recall when the Palace Massage Parlor was burned? Do you recall the happening, not the date?

A Yes, I recall there being a fire there.

Q You recall there being a fire and after there was a fire, after that fire, did you, at any time, make any inquiries of anyone as to how that fire started?

MR. KASSNER: Objection, your Honor.

THE COURT: Overruled.

A Did I make any inquiries when?

Q After the Palace burned down.

A How soon after?

Q Any time after.

A I never made any inquiries. No, I never made any inquiries as to it.

Q When did you find out, for the first time, that the Palace Massage Parlor had intentionally

been set afire?

A I was told sometime later that Dexter Morton and--

Q Earl Jones?'

A -- Earl Jones were picked up.

Q Picked up. And, at that time, the time that they were picked up, was the first time that you had had any indication that the fire set at the Palace Massage Parlor was an arson?

A That's correct.

Q Is that correct?

A That's correct.

Q And, am I correct in assuming that, prior to that time, you never made any inquiry to determine the origin of that fire?

A That's correct.

Q Not at all?

A That's correct.

Q Did you ever make any inquiry-- withdrawn.

Where is the Palace located in relation to the Geisha House?

A It's a few doors east.

Q A few doors east. And you never, until Dexter Morton and Earl Jones were arrested, inquired of anyone as to the origin of that fire?

MR. KASSNER: Objection, your Honor.

That's the fourth time on the same question.

THE COURT: Yes. Objection sustained.

Q After the fire at the Palace Massage Parlor, did you talk with George and Jerry about the fact that there had been a fire?

A Oh, yes.

Q You had?

A Yes, there was a mention there was a fire. It was in the papers and over the radio.

THE COURT: The question was: did you talk to them and the answer is "yes"?

THE WITNESS: Yes.

Q At that time, was there ever any discussion about the origin of the fire?

A No.

Q Never at all?

A Never.

Q George and Jerry never indicated to

you the fact that there was a fire in a massage parlor just located down a few doors from theirs?

A I saw them very, very seldom. I went down to that massage parlor maybe four or five times a year.

THE COURT: You're talking now about the Geisha House?

THE WITNESS: Yes, the Geisha House. I don't even think I was there, your Honor, four or five times a year.

Q By the way, did you talk about what's on that agreement with Mr. Kassner during the recess, People's Exhibit 2?

A No, we did not discuss that agreement during the recess.

Q You never mentioned to Mr. Kassner or he never mentioned to you, what was on that agreement while you were talking about the case out here?

A Mr. Kassner knew about this agreement ^{a long} ~~long~~ time ago.

Q I didn't ask you that. I asked you--

THE COURT: Well, he answered it and the answer was "no."

Q You didn't talk to him at all?

A During the recess, we did not even discuss this agreement.

Q Did you discuss the case?

A During recess I forget what we discussed. No, Mr. Kassner was talking to another witness during recess.

Q You have been to the Geisha House; correct?

A Yes, sure I've been there.

Q Have you been to the French Model Studio?

A That's the one down there further.

Q 436, the one that this trial consists of?

A Yes, I've been to the French Model Studio. I think I was there one time.

Q When were you there?

A I don't know. It was years ago. I mean, the same time--

THE COURT: All right; "years ago."

Q Were you there before or after the fire at the French Model Studio?

174

A I couldn't recollect.

Q Was it about the time of the fire?

A No, it was before the fire because I never saw it after the fire.

MR. KAVANAUGH: If you want a recess to talk to him, we'll give it to you.

MR. KASSNER: All I want is for him to be responsive and not to give extra answers.

THE COURT: I will admonish him when it's necessary, Mr. Kassner.

MR. KASSNER: Yes, your Honor.

Q Now, Mr. Hodas, what is the comparative size of the French Model Studio to the Geisha House?

MR. KASSNER: Objection, your Honor.

First, we have tax audit and now we have architecture.

MR. KAVANAUGH: Your Honor, can we have a side bar? If the Court is questioning about the relevance of this, I will get to it in a minute. Counsel has said--

THE COURT: All right.

Go ahead.

MR. KASSNER: If your Honor please, why can't we x talk about the issues in this case for a change? We're talking about everything except what the issue--

THE COURT: I've heard enough about that. If you have a point to make, get to it very quickly.

MR. KAVANAUGH: I will go as expeditiously as I can, your Honor.

CROSS-EXAMINATION (continuing):

BY MR. KAVANAUGH:

Q Is the Geisha House bigger than the French Model Studio?

A I really couldn't recollect. Like I told you, I was only--

THE COURT: All right. You don't recollect.

A (continuing) I don't recollect.

Q Do you know if, at any of these massage parlors, that you had at-- do you know if, at any time, at the Geisha House, whether or not there's been prostitution
any ~~prostitution~~ in that location?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

MR. KAVANAUGH: May I ask the basis for sustaining that?

THE COURT: Well, may I ask the grounds for asking it?

MR. KAVANAUGH: I want-- this witness has said he only has a remote interest in the premises. I want to find out if it's more than that.

MR. KASSNER: What does that got to do with prostitution? Do I ask you if you bludgeon people at--

THE COURT: Please. I sustained the objection.

Q When was the first time that you learned that Eexter Morton and Earl Jones had implicated George Kaplan and Jerry Gomberg in these arsons?'

A I was told that, I guess, after they found out.

Q After who found out?

A After they found out that they were implicated.

Q Who? Mr. Kaplan and Mr. Gomberg?

A Yes.

Q And, when was that, do you remember?

A Some time after the fire.

Q Do you know how Mr. Kaplan and Mr. Gomborg found out that Earl Jones and Dexter Morton had implicated them in the fire?

A I imagine through their attorneys, through Mr. Kassner and Mr. Detsky.

Q Who was representing Mr. Morton and Mr. Jones at that time?

MR. KASSNER: Objection.

THE COURT: Will you ask him if he knows who was representing them?

Q Do you know if Mr. Kassner and Mr. Detsky were representing Dexter Morton and Earl Jones at the time they were arrested?

A No. Why should I know that?

Q You don't know that?

A No, I don't know that.

Q Do you know now that Mr. Kassner and Mr. Detsky represented Mr. Morton and Mr. Jones at the time of their arrests?

A Yes, now I know.

Q Now you know. And you indicate that Mr. Kaplan and Mr. Gomberg told you that-- told you that Earl Jones and Dexter Morton had implicated them; correct?

Hodas - Deft - cross

A I believe I heard it simultaneously up in the office of the attorney, I can't recollect exactly where it was or how I learned it or anything like that. I just remember hearing it. I know it happened after the fire.

There came an occasion that I had heard that they were implicated in the fire.

Q I see.

Well, did you hear that they had implicated Mr. Kaplan and Mr. Gomberg prior to your being arrested for this charge?

A Yes, I knew that and they implicated them in the fire.

Q Did Mr. Kaplan and Mr. Gomberg indicate to you that they were paying the attorney fees for Mr. Jones and Mr. Morton?

MR. KASSNER: Objection.

THE COURT: Overruled.

A No. We never discussed it at all. Like I say --

THE COURT: Okay, you answered the question, Mr. Hodas.

Q Did you ever learn, Mr. Hodas, that the fire marshals were investigating the origin

180

of the fire at the Palace Massage Parlor?

MR. KASSNER: Objection, your Honor.

THE COURT: Overruled. I'll take it.

You are leading up to something, I assume?

MR. KAVANAUGH: Yes, Judge.

A Yes, when I heard that they were picked up, that Dexter Morton and Earl Jones were picked up by Fire Marshals.

Q I see.

And when Dexter Morton and Earl Jones were picked up, did you talk to George Kaplan and Jerry Gomberg about Dexter Morton and Earl Jones?

A No.

Q Not at all?

A No.

Q But you knew, isn't it a fact, that Dexter Morton and Earl ~~the~~ Jones were employees of George Kaplan and Jerry Gomberg; is that correct?

A Yes, I knew that.

Q And yet you never asked George Kaplan and Jerry Gomberg about Dexter Morton and Earl Jones in their participation of a fire that took place several doors from the Geisha House?

181

Hodas - Deft - cross

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

Q I've asked you, did you ask. Did
x either George Kaplan or Jerry Gomberg ever say
anything to you about Dexter Morton or Earl Jones
or they did say something to you?

A Yes.

Q When?

A They said they were picked up later on?

Q When?

A You want me to use the expression that they
used when they said this to me?

K+G Q I want you to tell the truth.

A They said, "Those two crazy guys started a
fire," and implicated us.

Q When was that?

A This was sometimes after the fire.

Q After what fire, the French Model
Studio?

A Both of them. I don't even know. I couldn't
eventell you to this day which fire came first.

Q But this was shortly after Dexter
Morton and Earl Jones were picked up by the fire

marshals and arrested in this case; is that correct?

A That was after both fires, your Honor.

MR. KASSNER: I object to the "shortly" characterization. He didn't testify to "shortly." He testified to after.

Q Was it shortly after or long after they were arrested?

A I don't even remollect when they ~~were~~ were arrested. It was not my concern. It was actually not my concern. In other words, a fire was started, two guys were picked up.

The only remoteness that it had with me was that I was a landlord in a place where these men were employed.

Q You were a landlord. Is it correct that you are a landlord in this place where the fire took place just a few doors down from the building in which you were located?

Is that correct?

A Yes, that is correct.

Q And you weren't remotely interested in it at all?

183

MR. KASSNER: Objection, your Honor.
That's been asked and answered.

THE COURT: Sustained.

Q Let me ask you this: You testified
to a conversation you had with Chris Hatton?

A Yes.

Q And that conversation took place with
Mr. Levin who was in the area; is that correct?

A That's correct.

Q And you spoke to Mr. Levin shortly
thereafter; is that correct?

A That's correct.

Q And did you tell Mr. Levin that Chris
Hatton had come in to shake you down?

A No, I did not.

Q Did you tell Mr. Levin that Chris
Hatton had come in to ask you for money?

A Yes, I did.

MR. KASSNER: I would appreciate if the
district attorney would not intimidate my
witness, to stay away from him.

THE COURT: Yes.

MR. KAVANAUGH: I can't believe --

184

6
Hodas - Deft - cross

MR. KASSNER: What can't you believe,
Mr. Kavanaugh?

A Mr. Kassner told me never to discuss any
of those things with any of my employees.

Q When?

A Always told me that.

Q When?

A Concerning the fire after I was arrested.
He said do not discuss anything at all with any
of your employees in any matter at all with anybody
concerning this matter.

Q But you told Mr. Levin, isn't it correct,
that this man came in and asked you for money?

A Yes, one hundred dollars. But ^{nothing} ~~asking~~ to do
with the fire. I did not go ahead and associate
~~it~~ the one hundred dollars with anything to do with
the fire.

Q I understand that.

A Because those were my instructions.

Q I understand that you did not tell this
man about the fire and about a man came in and shook
you down. I understand that, Mr. Hodas.

A He asked me what he came in, and I said --

~~xxxxxx~~ MR. KASSNER: Please, you haven't been

185

asked any questions.

THE COURT: Mr. Hodas, you have answered the last question.

Q Now, are there any ~~other~~ other agreements like the agreement I have showed you in People's Exhibit 2 in evidence which bears the signature of Jerry Kaplan, George Gomberg, or Nick Valentine?

A Yes.

MR. KASSNER: Objection, your Honor; it is irrelevant.

THE COURT: Overruled.

A Yes, I believe there was an agreement Nick Valentine wanted for the Harem. I believe there was an agreement signed for the Harem himself.

Q Was there ever any agreement signed for the French Model Studio?

A To my recollection, I don't believe I ever had anything to do with the French Model Studio.

THE COURT: There was no agreement signed?

THE WITNESS: I don't recollect.

BY MR. KAVANAUGH:

Q So you're not sure. There may have been an agreement with the French Model Studio;

is that correct?

MR. KASSNER: Objection, your Honor.

He says he doesn't recollect.

THE COURT: Sustained.

A I don't recollect. I will say, your Honor, I doubt it.

THE COURT: All right. I think you have answered it doubly or triply.

MR. KAVANAUGH: Your Honor, may we approach the bench with a side-bar, please?

(The foregoing side-bar conference ensued out of the hearing of the jury.)

MR. KAVANAUGH: I am almost finished and I would ask the Court to have lunch. I don't think there is anything more. But I would like to continue my cross-examination just so there are any areas I would cover.

MR. KASSNER: Your Honor, I don't think cross-examination should be interrupted when it is almost finished. I don't think it is proper to interrupt it when ~~it~~ it is almost finished, and I would like to finish cross-examination and finish the witness.

THE COURT: What's the difference?

187

MR. KAVANAUGH: The Court has extended a courtesy.

THE COURT: Can't we agree on anything here? Let's go to lunch.

MR. KASSNER: You have to remember, I have people facing a very, very serious charge and I won't give him ice in the winter.

THE COURT: I understand it. And you are making this tough for me.

(Whereupon, the side-bar conference out of the hearing of the jury then concluded.)

THE COURT: We will recess until 2:30.

(Whereupon, a luncheon recess was taken until 2:30 p.m.)

—

AFTERNOON SESSION

(The jury enters the courtroom and ~~the~~ trial was continued.)

THE CLERK: Case on trial continues. The defendants are present, their attorney is present, the assistant district attorney is present. All the jurors are present.

M A R T I N H O D A S, previously called as a witness in his own behalf, resumed the witness stand, and testified further as follows:

THE CLERK: Martin Hodas, the witness, resumes the witness stand, has been previously sworn.

THE COURT: You are still under oath, Mr. Hodas.

CROSS-EXAMINATION

BY MR. KAVANAUGH: (Cont'd)

Q Mr. Hodas, just a few more questions: Mr. Hodas, do you recall ever in the summer or spring of 1972 talking with ~~sixth~~ either George Kaplan and Jerry Gomberg about Dexter Morton or Earl Jones?

MR. KASSNER: Objection; asked and answered, your Honor.

THE COURT: I think it has, Mr. Kavanaugh.

MR. KAVANAUGH: I don't recall, your Honor. May it be asked again?

THE COURT: Ask it then.

A I don't believe so, no.

Q Did they ever file any kind of complaints with you about Dexter Morton or Earl Jones?

MR. KASSNER: Objection; asked and answered.

MR. KAVANAUGH: That was not asked and answered.

MR. KASSNER: If he hasn't talked to them about it, they certainly couldn't have filed any complaints about it.

THE COURT: I don't know what you mean by filing any complaints. It seems to me it sounds rather official.

MR. KAVANAUGH: The man is the landlord.

THE COURT: Rephrase the question.

Q Did either George Kaplan or Jerry Gomberg in any way ever communicate to you that they were dissatisfied, disenchanted, annoyed, somewhat displeased with the performance of Earl Jones or Dexter Morton?

190

A No.

Q Never at all?

A Never at all. No reason to.

Q Mr. Hodas, when did you find out for the first time that the fire marshals had recovered a container in the Geisha House containing a flammable substance?

A I believe at this trial.

Q You believe at this trial?

A Yes. I don't think it was like ever even mentioned to me before. I didn't know anything about anything with any -- I didn't know anything about it.

Q You knew nothing about it at all?

A No.

Q Prior to coming in here today, Mr. Kassner never said anything to you about it?

A No.

MR. KASSNER: Objection, your Honor. He said he never heard anything about it before.

THE COURT: Sustained.

Q Let me ask you this: Did you know whether or not George Kaplan and Jerry Gomber kept

191

EX

a can or a plastic container containing a flammable substance in the Geisha House while they were subletting that premise from you?

A No.

Q You did not know about it?

A Certainly not.

MR. KAVANAUGH: I have no further questions, your Honor.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. KASSNER:

Q Mr. Hodas, did you ever hear any conversation about fires between any of the prosecution witnesses, yourself, and your co-defendants at any time?-

A Absolutely not.

MR. KASSNER: No further questions.

THE COURT: You're excused, Mr. Hodas.

(The witness was excused.)

MR. KASSNER: The defendant rests.

THE COURT: Will you approach the bench.

(The foregoing side-bar conference ensued out of the hearing of the jury.)

192

1097

NOTICE OF MOTION DATED FEBRUARY 14, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

JERRY GOMBERG and GEORGE KAPLAN,

Defendants.
-----X

: Indictment No.
: F394/73
: 3653/73

: NOTICE OF MOTION

S I R :

PLEASE TAKE NOTICE, that upon the annexed affidavits of JERRY GOMBERG and GEORGE KAPLAN, each separately sworn to the 19th day of February, 1974, the exhibits annexed thereto, the pertinent extracts of the minutes and upon all the proceedings heretofore had herein, a motion will be made before this Court at a Criminal Term, Part 128A thereof, Hon. Richard Denzer presiding, to be held in and for the County of New York, at the Courthouse, 111 Centre Street, New York, New York, on the 19th day of February, 1974 at 9:30 A. M., in the forenoon of that day, or as soon thereafter as counsel can be heard for an Order granting the following relief:

1. Arresting the judgment of conviction to be

193

1098

Notice of Motion Dated February 14, 1974

pronounced herein;

2. Vacating and setting aside the jury verdict;
3. Granting and entering judgment of acquittal; and
4. Such other and further relief as may be deemed just and proper;

Upon the following grounds:

- (a) Conflict of interest on the part of defense counsel;
- (b) Denial of effective assistance and deprivation of counsel in violation of constitutional rights;
- (c) Denial of due process and fair trial in violation of constitutional rights;
- (d) Recantations of two principal prosecution witnesses;
- (e) Prosecutorial misconduct;
- (f) Subornation of perjury;
- (g) Withholding of and failure to disclose exculpatory matter;
- (h) Obstruction of justice;
- (i) Newly discovered evidence;
- (j) Verdict is not supported by substantial

194

1099-1100

Notice of Motion Dated February 14, 1974

evidence;

(k) The credible evidence does not establish guilt beyond a reasonable doubt.

Dated: New York, New York
February 14, 1974

Yours, etc.,

IRWIN KLEIN, P. C.
Attorneys for Defendant,
JERRY GOMBERG
Office : P. O. Address:
Two Park Avenue
New York, New York 10016

KUNSTLER KUNSTLER HYMAN &
GOLDBERG
Attorneys for Defendant,
GEORGE KAPLAN
Office & P. O. Address:
Two Park Avenue
New York, New York 10016

TO: HONORABLE RICHARD KUH
District Attorney
New York County
155 Leonard Street
New York, New York

Criminal Clerk
Supreme Court
Room 1010
100 Centre Street
New York, N. Y.

195

1119

AFFIDAVIT OF GEORGE KAPLAN IN SUPPORT OF FOREGOING MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JERRY GOMBERG AND GEORGE KAPLAN, .

Defendants.

Indictment Nos.
F394/73
3653/73

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GEORGE KAPLAN, being duly sworn, deposes and says:

I am one of the defendants in the above-named case and submit this affidavit in support of my motion and the motion of Mr. Gomberg, a co-defendant, for a directed verdict and judgment setting aside the conviction, or for a new trial and for the other relief referred to in the notice of motion. I join specifically in each of the grounds asserted by Mr. Gomberg as if fully set forth in this affidavit.

I submit this affidavit to amplify the record so the Court is aware of facts relative to the issues raised by this motion.

AS TO THE CONFLICT OF INTEREST OF THE
ATTORNEY REPRESENTING ME

As the Court is aware, I was represented by the firm

196

1120

Affidavit of George Kaplan in Support of Foregoing Motion

of Kassner & Detsky, at the time of trial, which attorneys also represented the other two defendants.

I believe that as a result of this representation I was not able to obtain a fair trial since I was not able to put in a defense for myself and because the major thrust of Mr. Kassner's defense was for the defendant Hodas, whose interest was entirely different from my own. The only witnesses produced at trial were on behalf of the defendant Hodas and as it turned out at trial, his defense conflicted with my defense.

Prior to trial I was never advised by Mr. Kassner or Mr. Detsky that Mr. Hodas would defend on the ground that he was only the landlord and that Jerry Gomberg and I were the persons who owned and operated the premises and that therefore Mr. Hodas had no motive to engage in the crime alleged. There were never any meetings of the three defendants with counsel in which such a defense was ever discussed and I thus was not aware that Mr. Kassner would represent Mr. Hodas on this issue and represent us on a different basis.

Prior to trial I had asked my attorney if he thought we should get another lawyer, but I was advised by him that he could handle the case and that I shouldn't worry, and that another lawyer would hurt our defense. I did not know that our lawyers would make motions only for Mr. Hodas, claiming a conflict on his behalf and that they would seek to find defense witnesses only for Mr. Hodas.

197

1121

Affidavit of George Kaplan In Support of Foregoing Motion

Furthermore, I did not know that only Mr. Hodas was going to take the stand in his own defense and that I would be advised by Mr. Kassner that I should not take the stand even though I desired to do so to protest my innocence in this matter.

I desired to have witnesses called in my own defense as well as Mr. Gomberg's, to rebut the testimony of the prosecution witnesses. No effort was made to secure such witnesses, although one witness was, in fact, in court but was not called by Mr. Kassner. This witness was Jerry Bayarsky, who would have testified that Dexter Morton was having \$10 a week deducted from his salary to pay for a plane ticket to Atlanta so he could visit his mother. This ticket to Atlanta became, according to Mr. Morton, payment for the arson, which was untrue and which would have been rebutted by Mr. Bayarsky. In fact, Mr. Bayarsky was not called because Mr. Kassner refused to put him on the stand.

The reason why Mr. Bayarsky was not called and why I believe I was not permitted to take the stand nor was Mr. Gomberg, was because our testimony and the testimony of Mr. Bayarsky might have conflicted with Mr. Hodas' defense. I attach to this affidavit a statement by Mr. Bayarsky who is living in Florida, and which, because of the need for speed, was telegraphed to my lawyer's office. Mr. Bayarsky was asked to make a sworn statement in Florida and to deliver it to Western Union.

198

1122

Affidavit of George Kaplan In Support of Foregoing Motion

My lawyer advises me that we are expecting a written affidavit to be forwarded up to be presented to the Court. Mr. Bayarsky's testimony would have hurt Mr. Hodas' defense, since Mr. Bayarsky was led to believe that Mr. Hodas was more than a landlord. I believe this was a factor in the decision by Mr. Kassner not to call Mr. Bayarsky.

I also realize, now, that the decision not to call Mr. Gomberg or me to the stand may also have had such a motivation. Obviously any testimony by Mr. Gomberg or myself as to what we considered our relationship with Mr. Hodas and what monies were paid to Mr. Hodas might not have buttressed Mr. Hodas' defense. The question of Mr. Hodas' relationship to me and Mr. Gomberg was of course the most important defense for Mr. Hodas. Since my testimony might not have helped such a defense, I believe I was not allowed to take the stand.

I now realize that the efforts of our attorney were geared solely for Mr. Hodas' benefit. He was the prime client for Mr. Kassner and Mr. Gomberg and I were only the pawns. Cross-examination of prosecution witnesses was geared to determining Mr. Hodas' lack of motive to engage in arson. The affirmative defense was of course directed only to Mr. Hodas' case and not mine and Mr. Gomberg's. Mr. Levin was called to the stand, as was Mr. Hodas, to substantiate Mr. Hodas' claim that he was

199

1123

Affidavit of George Kaplan In Support of Foregoing Motion

only a landlord and had no motive for this crime. The clear implication, however, that was left by this defense was that Mr. Gomberg and I did have the motive and therefore did engage in such an act. It was thus very important for me to take the stand, as I am sure it was for Mr. Gomberg, to tell our knowledge of the incident and to deny the lies of the prosecution witnesses. We were not permitted to do so.

Mr. Kassner's summation also was directed towards arguing Mr. Hodas' lack of motive but by doing so he left the clear impression that we had such a motive. He told the jury that the District Attorney was out to get Mr. Hodas, who had nothing to do with this case and that Mr. Gomberg and I were caught in the middle. (See T. p. 941) / I now realize, as a result of having my own attorney for the first time, the problems that existed in my case. Had I been advised of the different defenses that would be raised for Mr. Hodas and myself and Mr. Gomberg, I never would have consented to having the same lawyer for all three of us. As it turned out, I did not have an attorney who was directing his full efforts on my behalf, but, rather, was directing it in the main towards Mr. Hodas. Before trial, because Mr. Kassner assured me that everything was fine and that there was no problem, I did not seek other lawyers. Mr. Gomberg and I were assured of this on several occasions. When Mr. Gomberg raised the questions that we had with the Court and the Court indicated to us

1124

Affidavit of George Kaplan In Support of Foregoing Motion

that we should go ahead to trial and that there did not seem to be any conflict, I assumed that everything was okay. I am not a lawyer and I assumed I was being properly represented. However, I now realize the problems that existed.

STATEMENTS OF CHRIS HATTON AND DEXTER MORTON

Attached to Mr. Gomberg's moving papers are statements of Mr. Hatton and Mr. Morton which indicate that they lied in saying that I had ever suggested or otherwise paid them or influenced them to engage in arson. They have voluntarily come forward and, in fact, I am advised that Mr. Hatton willingly went to Mr. Nadjari's office to tell what happened.

STATEMENTS OF JOHN DA GRASSO AND ELEANOR WILLIS

Attached to my affidavit are statements of John Da Grasso and Eleanor Willis with regard to Nick Valentine. I believe they are self-explanatory.

I also should note that Mr. Da Grasso's statement would have been relevant to our defense at the time of trial because of the conversation he heard between Nick Valentine and another person which seems to indicate that Mr. Valentine did not believe that Jerry and I were responsible for the fire. However, my lawyer did not advise me to seek any witnesses and thus Mr. Da Grasso was not present or available or known to me at the time of trial.

I also wish to note that the statements of Mr. Hatton and Mr. Morton raise an issue as to whether the prosecution

201

1125-1127

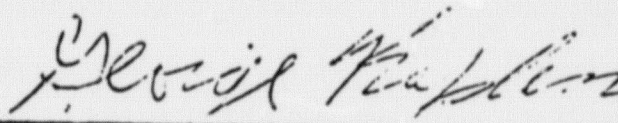
Affidavit of George Kaplan In Support of Foregoing Motion

witnesses ever met at one time to discuss their stories. At trial I believe they indicated they had not, but both Mr. Hatton and Mr. Morton have now informed my lawyer that in fact there was a meeting with the District Attorney.

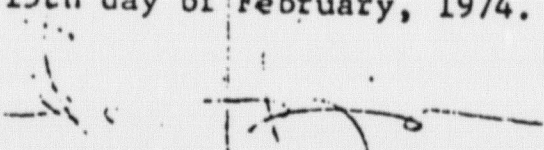
I believe the other reasons to set aside the verdict are contained in the transcript itself and I will not discuss the legal issues in this affidavit.

I want to make clear that my motion to set aside the verdict and for a new trial is to be an omnibus motion under §330.30 of the Criminal Procedure Law. However, I will not deal with the legal issues themselves in this affidavit since I am advised by my attorney that that should be done by brief and by legal argument. However, I am advised that there was not sufficient corroboration nor sufficient evidence to justify a conviction beyond a reasonable doubt.

Wherefore, it is respectfully requested that this motion and the relief prayed for be granted.


George Kaplan

Sworn to before me this
15th day of February, 1974.


STEVEN J. HYMAN
Notary Public, State of New York
No. 30-7027035
Qualified in Nassau County
Commission Expires March 30, 1974

202

EXHIBITS ANNEXED TO AFFIDAVIT OF GEORGE KAPLAN

EXHIBIT - TELEGRAM DATED FEBRUARY 14, 1974 FROM JERRY BAYARSKY
TO STEVEN HYMAN

1128

Trek

. NYH115)1433()1-024049A045(PD 02/14/74 1432

ICS IPMHWFA HWF

01022 PDC FR HOLLYWOOD FL 88 02-14 1156AEDT

PMS KUNSTLER KUNSTLER HYMAN AND GOLDBERG DLR

CARE STEVEN HYMAN 370 LEXINGTON AVE

NEWYORK NY 10017

7STATE OF FLA COUNTY OF BROWARD

JERRY BAYARSKY BEING DULY SWORN, DEPOSES AND SAYS

I WAS EMPLOYED BY THE PARTNERSHIP OF MARTIN HODAS J GOMBERT, G
KAPLAN. I KNOW FOR SURE THAT HODAS WAS STILL A PARTNER WITH GOMBERG
AND KAPLAN AT THE TIME OF THE FIRE. I ALSO WAS AWARE THAT
EDEXTER MORTON ASKED JERRY GOMBERG IN MY PRESENTS TO TAKE \$10
A DAY OUT OF HIS PAY AND HOLD IT F2R HIM TO BUY A TICKET T2 VISITED
HIS MOTHER IN ATLANTA. ON MOTHERS DAY

JERRY BAYARSKY

NNNN

CF-1201 (RS-60)

204

MR. CAVANAUGH: Your Honor, would you be good enough to instruct Mr. Hatton to remain in the courtroom?

THE COURT: Remain in the courtroom?

MR. CAVANAUGH: Yes, sir.

THE COURT: All right, you have a seat. Fine, Mr. Hatton. All right, your next witness, Mr. Klein.

MR. KLEIN: We call Jerome Bayarsky.

J E R O M E B A Y A R S K Y,

1229 Avenue Y, Brooklyn, New York, being duly sworn by the Court Clerk, testified as follows:

THE COURT: Is this defendant Bomberg's witness?

MR. KLEIN: It really doesn't make any difference, your Honor.

DIRECT EXAMINATION

BY MR. KLEIN:

Q Mr. Bayarsky, do you know Martin Hodas?

A Yes.

Q And Jerry Gomberg?

A Yes.

Q And George Kaplan?

A Yes.

Q And do you know that they operated a massage parlor?

A Yes.

Q And do you recall when there were a couple of massage parlors that had fires?

A Yes.

Q And did you work for Messers. Hodas, Kaplan and Gomberg in the operation of their massage parlor after those fires to the other massage parlors?

A After, yes.

Q And did you know the relationship, the business relationship between or among Mr. Hodas, Mr. Gomberg and Mr. Kaplan?

THE COURT: There is going to be an objection.

MR. CAVANAUGH: This is totally irrelevant. This is after the fires. I don't see what this has to do with anything?

THE COURT: I don't know what this is leading to. Would you approach the bench, please?

(Whereupon, the following discussion was held at the bench?)

MR. KLEIN: Your Honor, the purpose of this is to show, that it is offered on the conflict of interest to show that Hodas was still a partner at the time and that this man was available in Court to testify but when he told Mr. Kassner who was the attorney for the three of them that he knew that Hodas was a partner, then Kassner didn't put him on the stand.

THE COURT: You mean this is not on the recantation?

MR. HYMAN: No, it is not recantation.

MR. KLEIN: It is newly discovered evidence on the conflict.

THE COURT: I don't know, we're jumping around here. But any rate, let me get that again now. This witness, the offer of proof is what?

MR. KLEIN: The offer of proof is on the conflict of interest.

MR. CAVANAUGH: I understand what he's going to testify.

MR. KLEIN: He's going to testify that he worked for the three of them; that the

relationship among the three of them at the time of the fire and even afterwards was that of partnership. That he was in Court, in the Courthouse and made known, he was subpoenaed to testify and he made that known to Mr. Kassner that he--if he was called to the stand he would state that Mr. Hodas was a partner whereupon Mr. Kassner didn't call him on the stand. He said, "No, I'll put Hodas on. I don't want you to testify to that". There is a definite--

THE COURT: Well, I don't quite understand. Go ahead, I'll take it.

(Whereupon, the bench discussion was ended.)

Q Were you also employed by Messers. Hodas, Kaplan and Gomberg prior to the fires to these other places?

A Before the fires?

Q Yes, sir.

A No.

Q All right. Now, you knew that the three of them were defendants in this case?

A Yes.

Q And do you know an attorney by the name of

Kassner who represented the three of them?

A Yes.

Q And did you come to Court prepared to testify in the case in behalf of the defendants?

A I did.

Q And did you have a conversation with the attorney Mr. Kassner pertaining to the testimony that you would give?

A Yes.

Q And what if anything did you tell Mr. Kassner if you can recall?

A Mr. Kassner--I told Mr. Kassner that Marty was a partner at the time of the fire because I know after the fire I used to, every week bring in his share of the money, bring in an envelope.

THE COURT: Partner of whom?

THE WITNESS: Jerry Gomberg and
George Kaplan.

Q Used to bring him profits every week in an envelope?

A Yes.

THE COURT: What was your position there?

THE WITNESS: I was a clerk there,

part-time clerk. I didn't have a full time job.

Q After you told that to Mr. Kassner, what did he say?

A Well, he was going to put me on the witness stand but Mr. Hodas objected and said it would be better if he went on the stand and that's exactly what happened. He went on the stand and I didn't go on the stand.

Q Who was present during this conversation, you Mr. Hodas and Mr. Kassner?

A Mr. Gomberg and Mr. Kaplan were also present in the outer hall there.

Q And you were never called as a witness in the case then?

A No.

Q Do you know that whether or not Mr. Gomberg had been taking \$10 a night out of Mr. Morton's pay to reimburse him for a trip to Atlanta to see his mother?

A Yes, he had about \$80 of his.

Q And how long had that been going on?

A I don't know exactly but he did that to save his money to go see his mother in Atlanta. He had about \$80. I don't know the exact amount.

MR. KLEIN:

I have nothing further.

MR. HYMAN:

May I, your Honor?

THE COURT:

Yes.

DIRECT EXAMINATION

BY MR. HYMAN:

Q Mr. Bayarsky, you say that you spoke to Mr. Kassner out ide in the hallway. Was that during the trial itself?

A Yes.

Q Yes, of Mr. Hodas, Mr. Gomberg and Mr. Kaplan?

A Yes.

Q Now, how did that conversation come about?

A Well, I was supposed to be a witness.

Q And who had asked you to come to be a witness, do you know?

A George Kaplan and Jerry Gomberg.

Q And do you know what you were to be asked to testify about?

A Yes.

Q What was that?

A Just two things. The partnership of Mr. Hodas and the money that was being put aside for Mr. Dexter Morton to go see his mother in Atlanta.

Q And you had direct knowledge of what money was

being set aside to Mr. Morton?

A To a certain extent, I only knew about an approximate amount.

Q But you did know that money was being set aside?

A Yes.

Q And did you know the reason why money was being set aside?

A Yes.

Q What was that reason?

A Well, to hold onto the money to make sure he had money to go see his mother in Atlanta.

Q Had there ever been any discussion with Mr. Morton and you that that was a payoff to burn down other places?

A No, because this was after; that came after.

Q In fact that was the reason you were being called as a witness, was it not?

A Yes.

Q So you were being called, it is your understanding you were asked to appear by Mr. Kaplan and Mr. Gomberg to testify in their behalf?

A That's right.

Q Did you ever take the stand at the trial?

212

A No.

Q And who told you not to take the stand?

A Mr. Hodas told Mr. Kassner that it was better not to use me; just to use him on the stand.

Q And Mr. Kassner went along with that?

A Yes.

Q Did he tell you not to appear in Court?

A He told me--no, I was here. He told me not to get on the stand, stay out, and that's it.

Q And was this--did Mr. Hodas take the stand?

A Yes.

Q So this was just the time that Mr. Hodas, when the defense was going to put in its case that this came about?

A That's right.

Q This was after the prosecution had finished its case?

A Right.

Q And before the defense put in its case?

A Yes. I believe Mr. Hodas was the last one.

MR. HYMAN: Thank you. No further questions.

MR. CAVANAUGH: Mr. McManus is going to conduct the cross examination. I would only

ask at this time that in all due respects to Mr. Bayarsky that his testimony be stricken on several grounds. Number one, assuming Mr. Kassner wanted to put it in, there's no way he could have gotten it. It was clearly collateral. The testimony concerning--

THE COURT: Well, I don't know. I haven't analyzed the testimony. If it doesn't have any real probative value then it doesn't--

MR. CAVANAUGH: I'm only making that motion for the record.

THE COURT: If it does, it does.

MR. HYMAN: Your Honor, we offer this testimony not just as, you know, as a new witness since this man in fact was known to the defendants by his very testimony. We offer this in a very straight-forward and meaningful way in dealing with one issue, and that issue is the fact of the conflict; that it existed between Mr. Kassner representing Mr. Hodas and Mr. Kaplan and Mr. Gomberg. Just how persuasive Mr. Bayarsky's testimony would have been at trial is not a question I'm arguing in great depth though if I were trying the case I would have liked Mr. Bayarsky to testify.

THE COURT: All right, the testimony is in the record for what it is worth and I won't know what it is worth until I read it over.

MR. KLEIN: The only point I would make is to direct--invite your Honor's--excuse me, I meant to say invite. That motive was a big issue here and when Mr. Hodas got on the stand and testified that he was not a partner he was only a landlord, hence he didn't have any motive to put out a competitor who was lowering prices. This man's testimony would have contradicted him.

THE COURT: All right, thank you, Mr. Klein. Mr. Cavanaugh just went out of the room for a minute. Mr. Cavanaugh, do you wish to examine this witness?

MR. CAVANAUGH: Mr. McManus will do it. Sir, he's got more seniority.

CROSS EXAMINATION

BY MR. McMANUS:

Q How do you pronounce your last name?

A Bayarsky.

Q Where were you born?

A Brooklyn.

Q When did you start working for the defendants

215

in this case?

A August of 1972.

Q August?

A About that time.

Q What was your position with them?

A I was a clerk. I used to go around to the place and see that everything was all right; check the violations and pick up, keep the money, you know what I mean, when they come in, to check it out. to make sure that everything was done right. Part time, like four, five hours a day because I was very slow in my business.

Q What is your business?

A I drove a limousine for years and years. It got very bad up to that point and I needed a little extra money.

Q Have you ever be convicted of a crime?

A No.

Q Were you paid on a weekly basis by the firm of--

A Yes.

Q What was the name of the firm?

A I don't know.

Q Did you receive any pay slips from them?

216

A Well, I saw my friends about a week after or so. I saw Jerry to be exact.

Q When you say your friends, it is not clear on the record what you mean by your friends?

A I saw Mr. Gomberg. We're childhood friends, about a week after and George I saw two weeks after.

Q And when was the first time you told anybody that it was your believe that Mr. Hodas was a partner in that firm?

A I never told anyone. No one asked me at that time.

Q When was the first time you told another person?

A Well, when the lawyer asked me. Mr. Kassner. This was about a week before the trial.

Q And who got in touch with you to come down to Court?

A Mr. Gomberg.

Q I'm sorry?

A Mr. Gomberg.

Q And how did he get in touch with you?

A He called me at home.

Q He talked to you on the phone?

A Yes.

Q What did he tell you?

A We need your statement in Court.

Q What statement? Did he explain what statement he was referring to?

A He wanted the statement, the lawyer wanted a statement about--to prove that Martin Hodas was a partner at the time I was there and the saving of money for Dexter Morton to go to Atlanta to see his mother. That's all, those two things.

Q You came down the week later?

A I came down the week of the trial. The first time I came down they didn't use me and the second time, the last day, the last testimony that was supposed to go on and the last minute Mr. Hodas said, "It would be better that he doesn't go on, that I go on". He told Mr. Kassner and he said, "Forget about it, Mr. Bayarsky. We won't need you".

Q When did you speak to Mr. Kassner the first time about this case?

A About this case?

Q Yes.

A The week of the trial, I don't know the date, but the week of the trial when I was here the first time, they didn't call me in because they had too many witnesses before me.

Q That was the first time?

A Yes. And the second time was the last day.

Q Did you speak to him before you came down?

A Yes.

Q Where was that?

A In the outer lobby of the Court.

Q Outside the Courtroom?

A Right.

Q How long did you speak to him?

A About 10 minutes.

Q What did you say to him?

A Just what I said to you before about Martin Hodas being a partner at the time and the saving of the money for the ticket to go to Atlanta.

Q Now, when you made that statement to Mr. Kassner, where was Mr. Kaplan and Mr. Gomberg?

A They were right there.

Q Standing right alongside of you?

A Right.

Q And when you made that statement to Mr. Kassner, the first time you came down, somewhere in the Court-house, did Mr. Kaplan and Mr. Gomberg were present?

A Yes.

Q Did they say anything to Mr. Kassner?

A Not to my knowledge.

Q What did Mr. Kassner say to you?

A He said, "Well, that will be your testimony for you in Court", you know, "Would you be willing to go up and testify?" I said, "I certainly will. It is the truth. I only want to tell the truth".

Q You appreciate today that your testimony today is under oath?

A Yes.

Q And you know if you tell a lie that you can be charged with a crime?

A Yes, sir.

Q Did you receive any money to come down to Court today?

A No.

Q Now, you indicated that there was, after the first time you spoke to Mr. Kassner, a week passed and you spoke to him again, is that correct?

A Yes.

Q That was also down here in Court?

A In the Court building, yes.

Q In the Court building?

A Martin Hodas wasn't here the first time. The second time he was here.

Q I'm talking about Mr. Kassner though?

A Yes. He was here with Martin Hodas and George Kaplan.

Q And this was a week later?

A Right.

Q What did Mr. Kassner say to you?

A "We're going to use your testimony in Court today".

Q Then what happened?

A Then Martin Hodas told them "It would be better if I go on the stand instead of Mr. Bayarsky. My testimony might be better".

Q So Mr. Hodas said that?

A Right. So Mr. Kassner says, "All right, you don't want him on. You don't go on, Jerry. We use Mr. Hodas".

Q And where was Mr. Kaplan and Mr. Gomberg?

A They were right next to us.

Q Did they say anything to Mr. Kassner at that time?

A No, they let the lawyer do everything.

Q They never said anything at all?

A No.

MR. HYMAN:

Never said anything at all is a broad statement. You mean while Mr. Bayarsky was there?

THE COURT: I assume during this conversation.

MR. HYMAN: Well, if he limits his conversation, I have no objection.

Q All right. During the period of time that you were present when you had the second conversation with Mr. Kassner, it is your testimony that Mr. Hodas was present, Mr. Kaplan was present and Mr. Gomberg was present?

A The second time?

Q The second time.

A Yes.

Q And it was at that second conversation that Mr. Hodas said to Mr. Kassner that it would be better if I went on the stand and not Jerry?

A Yes, exactly.

MR. HYMAN: Well, by Jerry, I think the clarification, by Jerry you're talking about yourself?

MR. McMANUS: Jerry Bayarsky, yes.

Q And when that statement was made by Mr. Hodas, it is your testimony, sir, is it not, that Mr. Kaplan and Mr. Gomberg were standing right alongside, it was a group?

222

A Yes.

Q After that statement was made by Mr. Hodas to Mr. Kassner, did you hear Mr. Gomberg say anything?

A Possibly because I walked away and they were talking.

Q Did you hear them say anything, sir?

A No, I didn't hear anything. I walked away.

Q Did you hear Mr. Kaplan say anything at that time?

A I don't remember. They were talking, I don't know who spoke.

Q You walked away?

A Yes.

Q Did you go home?

A No. I waited. It was almost over.

Q And did Mr. Kassner say to you that you would not be placed on the stand?

A Yes.

Q Was Mr. Gomberg present when Mr. Kassner said that to you?

A Yes.

Q And Mr. Kaplan was also present when he said that to you?

A Yes.

Q And he wasn't speaking low or in the tone of

voice that no one else could hear but you, was he?

A No.

Q He was speaking in the normal conversational tone?

A Yes.

Q Now, you sent a telegram, did you not--do you know at what time of the day the second conversation took place between yourself and Mr. Kassner outside the courthouse or in the courthouse?

A It must have been after four or something like that.

Q In the afternoon?

A Because they only had time for one more witness.

Q Did you wait for, wait around for court to end that day?

A I waited because I wanted to get a ride home.

Q Whom did you go home with?

A Mr. Gomberg.

Q Did he at any time in the ride home--withdrawn. When you went homewith Mr. Gomberg, was it in a car or taxi?

A Car.

Q Whose car was it?

A It must have been Mr. Gomberg's.

Q Who was driving the car?

A Mr. Gomberg.

Q Who else was in the car besides you and he?

A I don't think there was anyone else.

Q Did he say anything to you about your not taking the stand?

MR. HYMAN: Objection, your Honor.

That's all subsequent to--

MR. CAVANAUGH: Oh, come on.

THE COURT: Overruled. Objection overruled.

Q When he rode home with you that day, did he mention anything about the fact that you were not going to be called by the defense?

A He couldn't understand why they didn't put me on the stand.

Q What did he say?

A He said, "I don't know why you wouldn't go on the stand" because he thought I was a key witness.

Q Mr. Gomberg said that?

A Yes.

Q Those were his exact words?

A Exact words to that effect, I mean, you know, close to it.

Q Did Mr. Gomberg on the ride home from Court indicate to you in any detail how he felt that your testimony might be helpful to the defense

225

in the case?

A No, he didn't.

Q His only statement was that he felt that your testimony, you would be a key witness for the defense. He didn't go into specifics?

A He didn't say that. His statement was that it would be helpful.

Q He didn't go into specifics?

A No.

Q Into any detail?

THE COURT:

There answer is no?

THE WITNESS:

No. There is no

response.

THE COURT:

The Reporter can't

record the shaking of your head.

Q Did Mr. Gomberg at any time after the second conversation took place between you and Mr. Kassner at anytime after that, by that I mean, after the conversation took place up until today, did he ever tell you that he felt that Mr. Kassner did not defend him to his ability?

MR. KLEIN:

That's objected to,

your Honor. There is no compulsion, there is no duty to speak.

THE COURT: Objection sustained.

Q Did Mr. Gomberg ever say to you that he
felt that Mr. Kassner was only interested in Mr.
Hodas and not he and Mr. Kaplan?

A No. I never spoke about that.

Q Did Mr. Gomberg ever complain to you at any
time about the representation of Mr. Kassner?

MR. KLEIN: That's objected
to, your Honor.

THE COURT: Overruled.

MR. KLEIN: Your Honor, exception.

A No, they never spoke to me about it.

MR. McMANUS: No further questions.

REDIRECT EXAMINATION

BY MR. KLEIN:

Q Do I understand when you told Mr. Kassner that
if you were called to the stand you would testify
that Mr. Hodas was still a partner, that you knew
him to be a partner in the firm, that Mr. Hodas
then said, "Never mind, don't put him on the
stand. I'll take the stand", and Mr. Kassner said,
"All right, we don't need you", is that it?

A Mr. Kassner said he won't be needing me for that statement after Mr. Hodas said he prefer if he goes on the stand instead of me.

Q And just before that, do I understand that you had told Mr. Kassner that if you were called to the stand you would testify that you knew that Mr. Hodas was still a partner?

A Well, I didn't say anything like that to him in front of what's-his-name, Mr. Hodas. Because this was spoken about beforehand.

Q You told him that beforehand?

A Right. We only spoke about going on the stand.

THE COURT: I take it there are no further questions of this witness?

MR. CAVANAUGH: Can I ask one further question?

THE COURT: Yes.

RE-CROSS EXAMINATION

BY MR. CAVANAUGH:

Q Mr. Bayarsky, you indicated to this Court that you told Mr. Kassner at one point that you knew Mr. Hodas to be an equal partner with Mr. Kaplan and Mr. Gomberg in the operation of that business,

correct?

A Yes.

Q And am I correct in understanding your testimony that that conversation took place before Mr. Hodas took the witness stand?

A Before?

Q Yes, sir.

A Before Mr. Hodas took the witness stand, this was a week before.

Q A week before. So that--you know Mr. Herbert Levin?

A No.

MR. CAVANAUGH: Okay, nothing further.

THE WITNESS: This is one week before the time that Mr. Hodas took the stand because he wasn't here at the time I spoke to him.

MR. CAVANAUGH: Thank you very much.

REDIRECT EXAMINATION

BY MR. HYMAN:

Q When you say a week, are you using it as a rough estimate?

A Well, during the trial. I don't know the exact estimate.

Q It could have been a couple of days, two days, three days or four days?

A Well, something like that.

MR. CAVANAUGH: But it was definitely before Mr. Hodas testified?

THE WITNESS: Oh, yes.

MR. CAVANAUGH: Judge, I owe an apology to counsel. As you may recall I offered counsel a copy of the tape, the recording of the conversation that Mr. Hatton had with the fire marshals and I had a series of transcripts which the Court is well aware of which were prepared by Mr. Kassner's office during the time of trial and I was under the impression that one of those transcripts was the testimony of Mr. Hatton. It ends up that those transcripts concern the testimony only of Mr. Dexter Morton. Mr. Cornbluth--I had left all the transcripts with instructions to send copies of transcripts to counsel. I was under the impression that we had a transcript of Mr. Hatton's conversation. All we have is the tape and a copy of the tape. The transcript has never been made. I'm turning over at this time again to counsel the copy

Colloquy

Upon the conviction under count one for arson in the second degree, I sentence you to an indeterminate term of imprisonment not to exceed seven years.

Upon the conviction under count three for arson in the second degree, I also sentence you to an indeterminate term of imprisonment not to exceed seven years. These sentences are to run concurrently.

When I characterize this as a lenient sentence under the circumstances, I am not indulging in idle chatter. The law authorizes me to impose a sentence having a maximum of 30 and a minimum of eight and one-third years.

Moreover, the last of these two crimes or had the last of these two crimes been committed some fourteen months later than its actual occurrence, I would have been compelled by law to impose not only a maximum sentence of 25 years, but a minimum sentence of at least nine years.

In light of those circumstances I think you may regard this sentence as extremely lenient.

We will take Mr. Kaplan.

COURT CLERK: You may appeal the sentence even

Colloquy

though you have no funds. If you wish to appeal you must file a notice of this in this court within 30 days. If you are without monies to employ counsel of your own choosing the Court will assign counsel without charge for the purpose of this proceeding. Do you understand?

MR. GOMBERG: Yes.

MR. KLEIN: Does your Honor wish me to make the application now or do you want me to wait? I was going to ask your Honor to please stay the execution of the sentence until I have had an opportunity --

THE COURT: We will wait until after the sentence of Mr. Kaplan and then you can make whatever application you wish under those circumstances.

COURT CLERK: George Kaplan, please rise. George Kaplan you are arraigned before this Court for sentence on your conviction by a jury of the crime of arson in the second degree under the first count of indictment 3653-73, F-394-73; and the third count, same indictment, arson in the second degree by a jury of your peers.

The People, the defendant and your counsel has a right to address the Court.

Colloquy

MR. JACOBS: I have no further remarks, your Honor.

THE COURT: The statement you made before was to cover both defendants.

Mr. Hyman.

MR. HYMAN: At this time, your Honor, I would formally request I be permitted to review the probation report to determine whether there are any serious errors, commissions or omissions with regard to it.

THE COURT: The application is denied.

MR. HYMAN: Your Honor, I would then ask whether there are any particular aspects of that report which your Honor is going to rely on which may be insufficiently supported by evidence by the Probation Department or something which would be in a position to refute, since I do not know what that report contains nor what allegations or charges Probation may make or not make.

THE COURT: When I make my statement you can well see what I have learned from the probation report.

MR. HYMAN: Then I will reserve that part of it until I hear what your Honor has to say on that.

Colloquy

Your Honor, sitting in court with Mr. Kaplan today are his son and also his uncle, Mr. Lou Kern.

Your Honor, my experience in endeavoring with Mr. Kaplan, I guess just as a "naive defense counsel" and I put that in quotes, has shown absolutely no connection with or any taint by organized crime.

I found Mr. Kaplan to be a rather sensitive and not the brightest individual, well-meaning in reform of the way I have come in contact with him and one that has made efforts to take care of those people around him in a compassionate way.

I am sure probation indicates that he is separated, if not divorced, from his wife and his son lives with his wife; that he does provide support; that he is and does have a girl friend with whom he has long associations; that he is engaged in the massage parlor business in that it is his means, in part, of livelihood.

Your Honor, he is not a major entrepreneur in the area. He has not, as he advises me, anything to do with organized crime and that he is involved with a place called the Geisha House.

Colloquy

The Geisha House is what it is, a massage parlor.

That is the sum and substance of his major involvement in this type of enterprise.

Your Honor, I would ask you to consider in sentence of Mr. Kaplan that the persons who admitted to setting the fire in determining the time and place to do it receive conditional discharges after having served 16 months.

The testimony, your Honor, I believe, against Mr. Kaplan is far from sufficient to at least in any way document the gross allegations of the district attorney's office.

I would ask your Honor to disregard that in its entirety.

I would ask you to impose a lenient sentence in this case.

Your Honor, I cannot deal with Mr. Kaplan's complete past criminal record without having the probation report as to ultimate dispositions that each is reflected by investigations of the probation department so I will reserve comment on that.

THE COURT: Let me say, Mr. Hyman, this applies to both Mr. Kaplan and Mr. Gomberg, I gave the probation report and the possible sentence which

Colloquy

I would impose in this case, if the time came, a great deal of thought. I made my determinations conditionally. The determination with respect to Mr. Gomberg was the same as it was before I came to court. Therefore, I have not changed anything because of the statement of the district attorney.

MR. HYMAN: Your Honor, that very well may be. I do not doubt how your Honor has arrived at the sentence.

I must say, your Honor, sometimes I may over-react in a courtroom. I am sure in a proper way. But sometimes I do get excited.

Your Honor, I have never heard -- I have only been practicing nine years --

THE COURT: I didn't want to have a gangplank here for any tirade against the District Attorney's office.

MR. HYMAN: It is not a tirade, your Honor.

THE COURT: I don't want to get into that subject. I just brought that up because I made it apparently clear I am not sentencing on the basis of anything the district attorney said. And that request is being granted.

Colloquy

Are you through?

MR. HYMAN: I am through, your Honor.

THE COURT: Do you wish to say anything in addition to what Mr. Hyman said on your behalf, Mr. Kaplan?

MR. KAPLAN: I would just like to say, I don't know how this all came about as far as any connection with organized crime, your Honor.

The truth is, I never was connected with any organized crime and for some reason I was pinpointed and everything was just blown up, magnified out of proportion. They made me like a bad guy.

Actually, your Honor, I am not saying, if I call myself a white knight, but I am not a criminal, your Honor. This whole thing is a frame. I have been framed with this.

My association with Hodas has put me in a spot and I never was a partner of Martin Hodas. The only thing we had together was that little massage parlor. We got nothing.

Jerry and I were like tiny fish. We have been put in a spot.

I feel the way this whole thing took place,

Colloquy

your Honor, as far as a conflict and if it was a explained to me I would have probably said something. I would have reacted. But Kassner kept on telling me, "Don't you have confidence in me? Who are you going to get? I am the best lawyer in the country. Could you get anybody as good as me? If you get somebody as good as me I will work with them, if not, don't even bother."

Then during the trial at lunch he would say, "You want 20 to 1? You are a gambler. You want 20 to 1 odds?"

I am just saying, your Honor, I know the verdict. We were found guilty. But, your Honor, I always believed in justice. I do. I really do.

I don't believe this is taking place here. It is like a nightmare how we got muddled into this thing, how we got framed and now we are being sentenced for this thing that we never had nothing to do with.

That is all I can say, your Honor. I do believe in justice. I am sorry if I said anything out of the way.

THE COURT: It is your privilege to say anything you wish.

Colloquy

MR. KAPLAN: I am only speaking the way I feel inside.

THE COURT: Anything else?

MR. KAPLAN: No, your Honor.

THE COURT: Mr. Kaplan, I know that you have been present in the courtroom during the sentencing of your co-defendant, Mr. Gomberg. Some of my remarks including those dealing with the nature of the crimes and the acquittal of Martin Hodas are, of course, applicable to you.

Your history of embroilment with the law is liberally sprinkled with arrests for assault, homicide, larceny and bribery, none of which resulted in conviction and one for promoting prostitution, which terminated in a misdemeanor conviction and a \$1,000 fine.

That at least is according to the probation report.

MR. KAPLAN: I cannot say something about that, your Honor?

MR. HYMAN: We do agree with that, that they did not result or the only conviction is the promoting prostitution, the misdemeanor.

MR. KAPLAN: And the assaults I had when I

Colloquy

worked as a bouncer. Excuse me, your Honor.

THE COURT: I said there were no convictions of any kind except for the promotion of prostitution.

From a conviction standpoint at least your record is superior to that of Mr. Gomberg.

On the other hand, your personal history, your life style and employment record, according to the probation report, again suffers by comparison.

You do not appear to have established any firm marital or family ties, and apart from a year or so of employment at a massage parlor, prior to the crimes in issue here, your work record in recent years is reported to be very fussy.

On balance, your situation with respect to sentence may be pretty well equated to that of Mr. Gomberg and accordingly I impose the same sentence.

Upon the conviction under count one for arson in the second degree, I sentence you to an indeterminate term of imprisonment not to exceed seven years.

Upon the conviction under count three for arson

Colloquy

in the second degree, I also sentence you to an indeterminate term of imprisonment of not to exceed seven years.

These sentences are to run concurrently.

COURT CLERK: George Kaplan, you may appeal the sentence even though you have no funds. If you wish to appeal you must file a notice of this in this court within 30 days. If you are without means to employ counsel of your own choosing the Court will assign counsel without further charge to you for the purpose of proceeding.

Do you understand?

MR. KAPLAN: Yes.

MR. KLEIN: Your Honor, at this time and particularly in view of these lengthy post-verdict proceedings which were closely contested and bitterly fought, and in which an Appellate Court may take a different view than your Honor, with all due respect, I respectfully request at this time that your Honor stay the execution of sentence of these defendants pending such appeal.

We are both prepared to file notice of appeal at this moment. They are prepared already or in the alternative, if your Honor feels, you at one

241

Summation - Defense

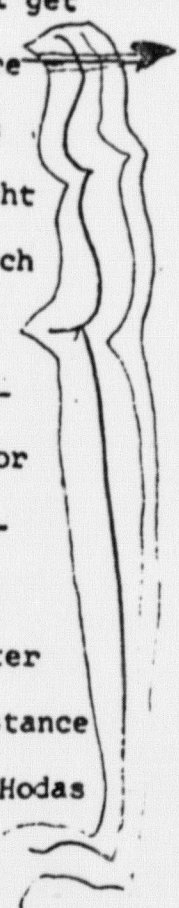
940

was to get 25 per cent of the profits and in which the three of them were supposed to build it. That agreement was in evidence. Now, between then and the beginning of the year the partnership broke up between Valentine, Jerry Gomberg and George Kaplan when Valentine went in and broke up the Harem as you heard about, and got punched by George Kaplan. At that time Mr. Hodas testified that that agreement which you have was no longer worth anything because that partnership was up, it was gone and he, because of pressures on massage parlors and various other reasons didn't want anything to do with massage parlors. So he rented the space without any percentage to George Kaplan and Jerry Gomberg. There is no evidence in this case to indicate that Mr. Hodas had an interest at the time of the fires in the Geisha House. There is no conceivable reason why he would take part in any fires without an interest in the Geisha House. The whole theory of the district attorney is that they were trying to improve their competitive advantage somehow by destroying other places. So the question becomes, why has the government been trying so hard to get Mr. Hodas who wasn't in it in the beginning of this case; wasn't

Summation - Defense

941

in with any of these people at the beginning of this case because nobody talked about Hodas at the beginning of this case. They talked to fire marshals and they talked to district attorneys; Hodas wasn't in this case. Hodas was brought into this case. He was brought in by powers of persuasion; by talking to witnesses. Why are they trying to, so hard to get Hodas into this case? Obviously Hodas is the one they are trying to get. They don't want Chris. He can walk the streets. They don't want Dexter; him they'll get rid of as soon as this case is over. They certainly don't want Earl Jones; him they'll get rid of as soon as the case is over. What they are looking for is to make a case against Marty Hodas and poor Jerry Gomberg and George Kaplan are caught in the middle of this. But there is not one stitch of evidence in this case to indicate that at the time these fires took place Mr. Hodas had any conceivable reason, any interest in the massage parlor or any conceivable reason to do any damage to anybody on that block because as you heard Mr. Levin and as you heard Mr. Hodas, he had no interest after that January, 1972 date. That is the sum and substance of their testimony. Of course, Mr. Levin and Mr. Hodas



* * *

243

Dexter Morton knew you were going to be questioned by the fire marshal? Answer. Of course, because-- Question. Just say whether you knew. Answer. Yes. Right. Question. And you were together every day, is that correct, for three days? Answer. Right."

Now, if they knew they were going to be questioned by fire marshals and the fear sank in, what were they going to do? There is no reason to believe that Chris Hart did not know as well and that they all didn't sit down and try to work out some sort of salvation. It was undoubtedly in that three day period that the scheme to trade off their employers for themselves came into their demented minds. The problem is they couldn't get their stories straight. The reason they couldn't get their story straight was because it was a tissue of lies and these three people don't have good enough memories to lie.

As a result of the inconcistencies--all of the inconsistencies developed in their story. Since the name of Martin Hodas appeared later than that of Gomberg and Kaplan in these confessions, I have to assume that the name was implanted by the interrogators who undoubtedly indicated subtly or otherwise that it would be nice if they implicated Mr. Hodas. This

Summation - Defense

947

most serious felony and have their lives and the lives of their family destroyed merely because the nature of their business requires them to employ the likes of these three people in connection with the operation of their business. It is far too great a price to ask them to pay for the worst imagined consequences, the operation of a massage parlor. As to Mr. Hodas, it is indeed a stiff penalty to pay for being a landlord.

The simple fact of the situation is that merely by interest of the nature of these prosecution witnesses and their clearly exposed contradictions, lies, interest in the outcome, criminal records and base and venal character and nature, there is no credible evidence whatsoever upon which to convict these defendants. Were these defendants any one other than people involved in sexually oriented businesses in the midtown area, no prosecution would have been contemplated.

MR. KAVANAUGH: Objection.

THE COURT: Would read the last sentence.

(Whereupon, the last sentence
was duly read back to the Court.)

THE COURT: That's an argument. Whether it

245